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Nos. 82-1771, 82-963 and 82-1711

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL.

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

OSBORNE SHEPPARD

STATE OF COLORADO, PETITIONER

v.

FIDEL QUINTERO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, AND THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. In No. 82-1771, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable reliance on a search warrant that is subsequently held to be defective for lack of probable cause.

2. In No. 82-963, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable reliance on a search warrant supported by probable cause but later held to be technically defective for failure to incorporate the specification of items to be seized contained in the warrant application.

3. In No. 82-1711, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in the reasonable belief that the warrantless arrest of a burglary suspect did not violate the Fourth Amendment.

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption in No. 82-1771, Armando Lazaro Sanchez, Patsy Ann Stewart and Ricardo Albert Del Castillo were appellees below and are respondents here.

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BRIEF FOR THE UNITED STATES

The Solicitor General, on behalf of the United States, submits this brief for the United States as petitioner in No. 82-1771 and as amicus curiae in

support of the petitioners in Nos. 82-963 and 82-1711.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) and the ruling of the district court suppressing evidence (*id.* at 9a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1983 (Pet. App. 7a). A petition for rehearing was denied on March 4, 1983 (*id.* at 8a). The petition for a writ of certiorari was filed on April 29, 1983, and granted on June 27, 1983 (J.A. 151). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. *No. 82-1771*—On October 2, 1981, a five-count indictment was returned in the United States District Court for the Central District of California charging respondents with conspiring to possess and distribute cocaine, in violation of 21 U.S.C. 846 (Count I) (J.A. 27-29). In addition, respondents were variously charged in substantive counts with the possession of cocaine (Counts II, III and V) and methaqualone (Count IV) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (J.A. 29-30). Respondents thereafter moved to suppress contraband and other evidence seized pursuant to a judicial warrant au-

[1] The filing of a consolidated brief in these three closely related cases was authorized by Justice Rehnquist in an order dated August 29, 1983. The formal portions of this brief pertain to No. 82-1771, the case to which the United States is a party, and, unless otherwise indicated, references to the appendix to the petition and to the joint appendix are to the documents filed in that case.

thorizing the search of residences and automobiles belonging to them. Following an evidentiary hearing, the district court granted the motion to suppress in part, finding that the search warrant was not supported by probable cause (Pet. App. 10a).[2] The court of appeals affirmed the suppression order, with one judge dissenting (*id.* at 1a-6a).

a. The affidavit in support of the search warrant contained the following information. On August 18, 1981, a confidential informant of unproven reliability told Officer Cyril A. Rombach of the Burbank, California, Police Department that two persons known to him as "Armando" and "Patsy" were selling large quantities of cocaine and methaqualone (quaaludes) from their residence at 620 Price Drive in Burbank (J.A. 37). According to the informant, "Armando" sold cocaine in quantities of one-half pound and larger, and "Patsy" sold methaqualone in quantities of 100 tablets and larger (*ibid.*). The informant also stated that he had been present at the Price Drive residence five months earlier and had at that time seen "Patsy" sell 500 methaqualone tablets (*ibid.*). At the same time, the informant observed a shoe box containing between $50,000 and $100,000 that belonged to "Patsy." Finally, the informant stated that "Patsy" and "Armando" kept only relatively small quantities of drugs at the Price Drive residence, storing the remainder at another location somewhere in the "hill area" of Burbank (*ibid.*).

On receipt of this information, Burbank police officers instituted a month-long investigation that first focused on the Price Drive residence and later on

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[2] Not all of the evidence was suppressed as to all of the respondents because the court held that no single respondent had a legitimate expectation of privacy in all of the places searched (Pet. App. 10a-13a; see also page 8 note 4, *infra*).

residences located at 716 South Sunset Canyon in Burbank and 7902 Via Magdelena in Los Angeles. On August 19, 1981, officers drove to the Price Drive residence and observed automobiles registered to respondents Armando Sanchez and Patsy Ann Stewart parked outside (J.A. 37-38). Although a records check revealed that Stewart had no prior criminal record, Sanchez had been found with $20,000 in currency at the Miami Airport in 1977, and had been arrested in Miami in December 1978 for possession of marijuana (J.A. 38).

On August 24, 1981, officers observed the arrival at the Price Drive residence of an automobile registered to respondent Del Castillo (J.A. 38). A Latin male exited the vehicle, entered the house, returned to the vehicle ten minutes later carrying a small paper bag and drove away. A background check disclosed that in January 1979 Del Castillo had been arrested in Miami for possession of 50 pounds of marijuana while he was attempting to board an aircraft bound for Los Angeles (J.A. 39). The telephone number for his employer that Del Castillo had given the probation authorities turned out to be registered to respondent Leon. Leon, in turn, had been arrested in 1980 on cocaine and quaalude charges and in 1979 on quaalude charges (*ibid.*). In addition, police officers were told by a woman, who previously had been arrested with Leon, that Leon was a drug importer affiliated with the "Cuban Mafia" (J.A. 39-40), and by a second informant that Leon had several thousand quaalude tablets at his residence (J.A. 40). Utility records showed that Leon lived at 716 South Sunset Canyon in Burbank (*ibid.*).

On August 25, 1981, officers observed Thomas Kilburn enter the Price Drive house and emerge a short while later carrying a paper bag (J.A. 40-41). The

officers determined that Kilburn had been arrested in 1974 for possession of hashhish and cultivation of marijuana (J.A. 41). On August 26, 1981, the officers observed an unidentified individual enter the Price Drive residence and emerge a short time later carrying a small box (*ibid.*).

On August 28, 1981, officers observed Del Castillo's vehicle being driven from Price Drive to a condominium at 7902 Via Magdelena. Later that day, Sanchez drove in his vehicle from Price Drive to Leon's Sunset Canyon residence, where Sanchez obtained a small package and returned to Price Drive. Later, an unidentified man drove to the Price Drive residence and entered the house. At about the same time, a man driving Del Castillo's vehicle arrived, ran into the residence, and ran back out immediately. Sanchez then left the Price Drive house, drove to a neighboring town, parked his car, and entered an unknown house. Before surveillance was lost, Sanchez was observed returning to his car with a large rectangular container (J.A. 42-43).

On September 8, 1981, officers were engaged in the surveillance of another house as part of a separate drug investigation. They observed Patsy Stewart drive up to the house. A female left the house and entered Stewart's vehicle. One minute later, she returned to the house carrying a small paper sack. Later that day, the occupants of that house were arrested for purchasing amphetamines from persons not related to this case (J.A. 43).

On September 11, 1981, the officers saw Sanchez and Stewart drive to the Los Angeles airport, where Sanchez, carrying only a small briefcase and a garment bag, boarded a flight for Miami (J.A. 44). Four days later, Stewart was driven to the airport in Del Castillo's automobile. Visibly upset when told that she could not carry a large suitcase on the plane

with her, Stewart checked the bag and boarded a flight for Miami (J.A. 46-47). Stewart and Sanchez both returned to Los Angeles on September 19, 1981. Although they had been seated together on the plane, Stewart and Sanchez deplaned and walked through the terminal separately; they rejoined one another only near the exit to the terminal. The pair carried many pieces of carry-on luggage, most of which they had not taken to Miami. And, although they had checked at least one piece of luggage in Miami, they did not pick up any checked luggage in Los Angeles. Nor did either of them have the large suitcase that Stewart had taken with her to Florida (J.A. 48-49). As they were entering a taxi, the two were approached by airport narcotics officers who conducted a consensual search of their luggage. A small amount of marijuana was found (J.A. 49).

In the early morning hours of September 19, 1981, the officers saw a silver Chevrolet that was registered to Sanchez parked in front of Leon's house on Sunset Canyon. The vehicle was later seen at the Price Drive residence (J.A. 49). The officers then went to 7902 Via Magdelena, where they observed the interior lights on. This was the first time since the beginning of the investigation that the officers had seen any sign of occupancy at the condominium.[3] Two days later, on September 21, Sanchez's automobile was observed parked outside the condominium (J.A. 50).

From these observations, Officer Rombach concluded that respondents were engaged in an on-going criminal enterprise involving the transportation and distribution of controlled substances (J.A. 52). Officer Rombach based his opinion both on personal

[3] Investigation showed that the utilities at the Via Magdelena condominium were listed in Stewart's name, but that there was no telephone service (J.A. 47).

experience as a narcotics officer and on specialized training in narcotics investigations (J.A. 50-52). In addition, Officer Rombach opined that the Via Magdelena condominium was being used as a "stash pad" to store large quantities of narcotics, which were then transported in smaller amounts to respondents' residences for distribution (J.A. 47-48). Officer Rombach averred that major drug dealers most often store large quantities of drugs at locations other than their primary residences to minimize the risk of seizure if their activities are detected (*ibid.*).

b. Based on this information, a state superior court judge issued a warrant on September 21, 1981, authorizing the search of the residences at 620 Price Drive and 716 South Sunset Canyon, the condominium at 7902 Via Magdelena, and automobiles registered to Sanchez, Stewart, Leon and Del Castillo (J.A. 31-33). In an ensuing series of searches, police officers seized more than four pounds of cocaine and 1,165 quaalude tablets at the Via Magdelena condominium, nearly a pound of cocaine at Leon's house on Sunset Canyon, and about an ounce of cocaine at the Price Drive residence of Stewart and Sanchez. The officers additionally found paraphernalia for testing, cutting and packaging cocaine, scales, a police radio and large amounts of currency (J.A. 53-69). Finally, a search of Stewart's automobile produced two garage door openers—one for the Price Drive residence and one for the Via Magdelena condominium—while a search of Del Castillo's automobile revealed a small amount of marijuana residue.

c. The district court suppressed the seized evidence, finding that there was "no question" that the reliability and credibility of the informant had not been established (Pet. App. 10a). Although recog-

nizing that "[s]ome details * * * tended to corroborate" the informant's information, the court concluded that such details either corroborated information about a stale transaction or were "as consistent with innocence as * * * with guilt" (*ibid.*). Accordingly, the court found that the search warrant was not supported by probable cause.[4]

The district court rejected the government's argument that the exclusionary rule should not apply when evidence is seized in reasonable, good-faith reliance on a search warrant (Pet. App. 14a). In so doing, however, the district court specifically noted (*ibid.*):

> I will say certainly in my view, there is not any question about good faith. He [Officer Rombach] went to a Superior Court judge and got a warrant; obviously laid a meticulous trail. Had surveilled for a long period of time, and I believe his testimony—and I think he said he consulted with three Deputy District Attorneys before proceeding himself, and I certainly have no doubt about the fact that that is true.

d. On appeal, a panel of the Ninth Circuit affirmed the suppression order, with one judge dissenting. The

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[4] The district court rejected respondents' additional claims that the description of the items to be seized in the search warrant was impermissibly overbroad and that the officers had failed to comply with the California "knock-notice" rule during the execution of the warrant (Pet. App. 9a-10a). Moreover, the court held that only Sanchez and Stewart had a sufficient expectation of privacy to challenge the search of the Price Drive residence; that only Leon had a sufficient expectation of privacy to challenge the search of the Sunset Canyon residence; and that only Stewart and Del Castillo had a sufficient expectation of privacy to challenge the searches of their respective automobiles (*id.* at 10a-13a). No one, in the district court's view, was entitled to challenge the search of the Via Magdelena condominium (*id.* at 11a).

majority held that the only portion of the affidavit that adequately set forth facts to demonstrate the informant's knowledge of criminal activity—the informant's personal observation of "Patsy's" distribution of drugs—was fatally stale (Pet. App. 3a). The majority further held that the information supplied by the informant was inadequate under both prongs of the *Aguilar-Spinelli* test [5] and that the month-long independent police investigation was insufficient either to corroborate the informant's information or to revive the stale information (Pet. App. 3a). Finally, the majority flatly declined to recognize a "good-faith" exception to the exclusionary rule (*id.* at 4a).

In dissent, Judge Kennedy observed that "[t]he affidavit for the search warrant sets forth the details of a police investigation conducted with care, diligence, and good faith" (Pet. App. 5a). Judge Kennedy concluded that the informant's information was both adequately corroborated and sufficiently current in view of the month-long surveillance, which had revealed to experienced investigators a continuous pattern of conduct that "was quite inconsistent with any explanation other than illegal drug activity" (*ibid.*).

2. *No. 82-963*—On May 5, 1979, at approximately 5 a.m., the badly burned and beaten body of a 29-year old woman was found in a vacant lot in the Roxbury section of Boston (82-963 Pet. App. A3). Respondent was convicted of first-degree murder (*id.* at A1). On appeal, the Supreme Judicial Court of Massachusetts reversed respondent's conviction because certain evidence introduced at trial had been "obtained in the course of a police search conducted in good faith, but pursuant to a warrant which, although issued on probable cause, violated the constitutional and statu-

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[5] *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

tory requirement that search warrants describe the things to be seized" (*ibid.*).

a. After the murder victim's body was discovered, suspicion quickly focused on respondent, a boyfriend of the victim (82-963 Pet. App. A4). Respondent voluntarily accompanied police officers to the station for questioning (*id.* at A4-A5). On the way to the station, respondent told police that he had last seen the victim some five days earlier, that on that day he had gone to her house, stayed there for about an hour, and then left with her in a cab (*id.* at A5). They stopped to purchase some marijuana and a bottle of amaretto (*id.* at A6). Respondent told police that the victim then left him at about 1 p.m. and that he had not seen her since (*ibid.*). At the police station, respondent told essentially the same story, adding that after purchasing the marijuana and the amaretto he and the victim had gone to respondent's home at 42 Deckard Street in Roxbury and that the victim stayed there until approximately 2 p.m. (*id.* at A6-A7). Respondent also told the police that he had spent the evening of May 4 and the early morning hours of May 5, when the victim's body was found, at a "gaming house" in Dorchester (*id.* at A8).

The police interviewed various persons who, according to respondent, had been at the "gaming house" when he was there. The police learned that at about 3 a.m. on May 5, respondent had borrowed a car for a trip that should have taken approximately 15 minutes, but that he did not return to the "gaming house" until approximately 4:45 a.m. He remained there for only a few minutes and then left again (82-963 Pet. App. A8).

Continuing their investigation on Sunday morning, May 6, 1979, police learned from a friend of respondent that the basement of the Deckard Street house had been refinished and that respondent had said he

entertained women there (82-963 Pet. App. A9). With the owner's consent, police then inspected the car that respondent had borrowed the previous night. They found bloodstains and pieces of hair on the rear bumper and near the lid of the trunk (*id.* at A10). Inside the car were various types of wire (*ibid.*).

Later on Sunday morning, the police and the district attorney concluded that they should seek a warrant for respondent's arrest and a warrant to search his residence at Deckard Street (82-963 Pet. App. A10). An application for a search warrant was prepared by one of the investigating officers, and both the district attorney and his first assistant concluded that it set forth probable cause for the arrest and the search (*id.* at A11). The application specified precisely those items for which permission to search would be sought (*id.* at A12 n.7):

> A fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal), any possessions of Sandra D. Boulware, similar type wire and rope that match those in the body of Sandra D. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim.

At this point, on Sunday afternoon, no court clerk could be found, nor could the police find a suitable search warrant form. The best they were able to locate was a form once used for searches for controlled substances in the Dorchester Division of the Municipal Court (82-963 Pet. App. A13). One of the officers attempted to modify this printed form by crossing out the words "controlled substance" on one side of the form and replacing the word "Dorchester" with "Roxbury" (*ibid.*). He also inserted "2nd & Base-

ment" of 42 Deckard Street as the places to be searched (*ibid.*) Despite these changes and additions, the references to "controlled substance" in those portions of the form that constituted the application for a search warrant and, when signed, would become the warrant itself, were not deleted (*id.* at A13-A14).

Several police officers and the first assistant district attorney then went to the home of a judge, arriving at approximately 2:45 p.m. on Sunday afternoon. The judge was unable to find a suitable search warrant form in his library, and so he used the "controlled substance" form as modified by the police and by himself. Again, however, no change was made to the substantive portion of the warrant. Thus, the warrant authorized the police "to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance" (82-963 Pet. App. A15). The warrant did not refer to the items listed in the police officer's affidavit in support of the application, nor was the affidavit attached to the search warrant (*ibid.*).

One of the officers left with the warrant and his own affidavit in support thereof (82-963 Pet. App. A16). He thought the warrant was valid (*ibid.*). At about 5 p.m. on Sunday afternoon, he arrived at 42 Deckard Street to execute the warrant. He was admitted to the house by the respondent's mother and sister, neither of whom apparently asked to read the warrant (*id.* at A16-A17).

During the course of the search, the police found and seized apparently bloodstained boots, women's earrings, one apparently with bloodstains, an apparently bloodstained envelope, a pair of apparently bloody men's jockey shorts and women's leotards. The police also found bloodstains on the concrete floor of

the cellar that later were shown to match the victim's blood type (82-963 Pet. App. A17-A20). The Supreme Judicial Court of Massachusetts summed up the evidentiary significance of the search as follows (*id.* at A20-A21):

> It can readily be seen that evidence seized in the search of 42 Deckard Street tended to show that the [respondent] seriously injured the victim in his cellar, hid her earrings under a piece of plywood under a mat, and tied her up with wire available in the cellar of his home. This evidence, much of it obtained as a result of careful and commendable police investigatory techniques, was highly probative of the [respondent's] guilt. Although the Commonwealth could have presented a case against the [respondent] without this evidence, this evidence was most important in rounding out a case based only on circumstantial evidence.

b. The trial court denied respondent's motion to suppress the evidence seized at 42 Deckard Street (82-963 Pet. App. B1-B48). The court first held that the affidavit in support of the search warrant established probable cause to search the premises at 42 Deckard Street (*id.* at B26-B29). The court then held, however, that the warrant was "fatally defective" (*id.* at B34) because it did not incorporate by reference or have attached to it the application for the warrant, which, the court found, adequately specified the places to be searched and the items to be seized. Nevertheless, the trial judge concluded that the exclusionary rule should not be invoked because its deterrent effect would not be realized (*id.* at B42-B44):

> In this case the police sought a warrant. The affidavit was submitted to an official from the

> District Attorney's office for a determination as to its adequacy from the point of view of probable cause. There was proper presentment to a magistrate. There was an independent assessment of that disinterested judicial officer that there was probable cause to search. The police had adequately described with constitutional specificity the places to be searched and the items to be seized. The police presented a form which was the only form of warrant available to them. The magistrate said he could adopt it. Thereafter the actual search undertaken was within the limit of the authority the police thought reasonably had been granted.
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> * * * * *
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> [I]f police officers undertake their duties properly, they will act in the same fashion in similar circumstances in the future and the only consequence of applying the exclusionary rule would be to keep from the jury probative evidence and thereby impair the truth finding function.

c. The Supreme Judicial Court of Massachusetts reversed (82-963 Pet. App. A30-A53). A plurality of the court first held that the warrant was defective for failing to specify the items to be seized (*id.* at A30-A34). After noting that few courts had addressed the applicability of the exclusionary rule to situations involving judicial error rather than police misconduct, the plurality opinion concluded that suppression was of dubious validity as a deterrent "in cases where the police conduct was entirely proper, the defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct" (*id.* at A48-A49). Nevertheless, the plurality concluded that suppression was required in this case because this Court has not yet recognized an excep-

tion to the exclusionary rule for an error of the type that occurred here (*id.* at A49-A52).

Two justices concurred in the judgment because, in their view, the search warrant was so defective that neither the police nor the issuing judge could be said to have acted in reasonable good faith (82-963 Pet. App. A5-A12). The concurring justices also disagreed with the plurality on the efficacy of the exclusionary rule as a means for deterring judicial error (*id.* at A14).

Justice Lynch dissented. First, he noted that, the technical defect notwithstanding, the search warrant in this case posed none of the dangers of general warrants and that the police had in fact conducted the search as if the items to be seized had been specifically identified in the warrant (82-963 Pet. App. A2-A5). More importantly, the dissent concluded that application of the exclusionary rule in this case would "serve no beneficial purpose" (*id.* at A11):

> Police misconduct will not be deterred because none occurred. The human error committed by the judge harmed no rights of the defendant, as nothing beyond the evidence listed in the affidavit was searched for or seized. By contrast, application of the exclusionary rule will result in the very substantial harm of withdrawing highly probative evidence from the trier of fact.

Accordingly, the dissent concluded that this Court's exclusionary rule precedents did not mandate suppression in this case (*id.* at A12).

3. *No. 82-1711*—Respondent was convicted of second degree burglary. Following his conviction, the trial court granted his motion for a new trial and his motion to suppress evidence in light of an intervening decision of the Supreme Court of Colorado, *People* v. *Schreyer*, 640 P.2d 1147 (1982). On the State's

appeal, the state supreme court affirmed the suppression ruling, holding that the police lacked probable cause to arrest respondent and that evidence seized from respondent at the time of his arrest was therefore inadmissible at his burglary trial. The court also declined to recognize a "good faith" exception to the exclusionary rule because this Court has not yet done so (82-1711 Pet. App. 7); it further held that Colorado's statutory good faith exception (Colo. Rev. Stat. § 16-3-308 (Supp. 1982)) did not apply to this case.

a. On September 29, 1981, Darlene Bergan was outside her home in Denver sweeping the porch. She saw a man walking on the opposite side of the street and observed him briefly peering into the front window of the house across from hers. After observing him apparently looking into other windows at the same house, she saw him stop at another house, after which he disappeared from her view. She next saw him about an hour later at a bus stop next to her house. He had taken off his shirt and was using it to cover a television set. He appeared nervous to Mrs. Bergan, and she called the police (82-1711 Pet. App. 3).

Officer Freeman, a 21-year police veteran, was the first to respond to the dispatcher's report of a possible burglary suspect. He asked respondent for identification, but respondent had none. Other officers then arrived at the scene. They asked respondent various questions, to which he responded that he had bought the television set from someone in the neighborhood for $100 and was trying to take it home. He was wearing an undershirt and had brown wool gloves in his back pocket (82-1711 Pet. App. 4).

After Mrs. Bergan came outside and identified herself as the person who had called the police, respondent was arrested and searched (82-1711 Pet. App. 4).

Under his shirt, police found the television set and a video game. They also found $140 in cash, five rings (including two class rings bearing different initials and class years), and some women's jewelry in respondent's pockets (*id.* at 4-5).

Several hours after respondent was arrested, the owners of a house one block south of Mrs. Bergan's house reported that their house had been burglarized and that a television set and a video game had been stolen. The television set and video game that had been found in respondent's possession were later identified as the items taken in the burglary (82-1711 Pet. App. 5).

b. A majority of the state supreme court held that the officers lacked probable cause to arrest respondent because they did not learn until several hours after the arrest that a burglary had in fact been committed. As the majority explained (82-1711 Pet. App. 6-7):

> The arresting officer in this case believed that probable cause existed to arrest Quintero. At the time the arrest was made, the police knew that Quintero was a stranger to the neighborhood, and that he claimed that he had purchased a television set from someone in the neighborhood. They also knew that he had attempted to cover the television set and the video game with his shirt. He had no identification, but no evidence existed to establish that a crime had been committed. *Brown* v. *Texas*, 443 U.S. 47 * * * (1979). The police did not learn who the owners of the television set and the video game were until more than five hours after they arrested Quintero. Suspicion does not amount to probable cause and an analysis of the facts requires us to reach the

same conclusion which we reached in *People* v. *Schreyer*, 640 P.2d 1147 (Colo. 1982).

The majority also held that the lack of probable cause to arrest was not remedied by the inevitable discovery doctrine (not here in issue) or a good faith exception to the exclusionary rule. As for the latter, the majority held that it would be "inappropriate" for the state supreme court to adopt a good faith exception in the absence of action by this Court (82-1711 Pet. App. 7).

Finally, the majority concluded that Colo. Rev. Stat. § 16-3-308 (Supp. 1982), which renders admissible evidence seized as a result of a good faith mistake, was inapplicable here, holding that the statutory exception is limited to errors of fact rather than errors of law and concluding that the "mistake" in this case had been one of law in assessing the existence of probable cause to arrest (82-1711 Pet. App. 8).

Justice Rovira dissented, both on the question of probable cause to arrest and on the application of the exclusionary rule (82-1711 Pet. App. 10-17).

SUMMARY OF ARGUMENT

1. Nothing in the Fourth Amendment or any other provision of the Constitution either directly or implicitly provides for the exclusion of illegally seized evidence from criminal trials. Instead, decisions of this Court over the last two decades have made it clear that the exclusionary rule first enunciated in *Weeks* v. *United States*, 232 U.S. 383 (1914), and later extended to the states in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), is a judicially-created remedy, the paramount and perhaps sole purpose of which is the deterrence of unlawful police conduct. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974); *Desist* v. *United States*, 394 U.S. 244, 254 n.24 (1969). As the deter-

rence rationale has achieved supremacy over earlier, now-discarded justifications for the rule, the Court has recognized that it makes sense to apply the rule only to those situations in which its deterrent purpose will in fact be significantly advanced. *Calandra*, 414 U.S. at 348. Accordingly, the Court now employs a cost-benefit analysis whenever it considers whether the rule should be applied to particular situations. When the costs of applying the rule are found to outweigh whatever deterrent effect it might achieve, the rule will not be imposed. See, *e.g.*, *United States* v. *Havens*, 446 U.S. 620 (1980); *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *Stone* v. *Powell*, 428 U.S. 465 (1976); *United States* v. *Janis*, 428 U.S. 433 (1976); *Calandra*, 414 U.S. 338; *Alderman* v. *United States*, 394 U.S. 165 (1969).

2. After nearly 70 years of experience with the exclusionary rule, it is now appropriate to apply the same type of cost-benefit analysis in considering whether to adopt a "reasonable mistake" exception to the existing rule. If, as we shall demonstrate in this brief, the benefits of applying the rule to certain classes of situations are outweighed by the costs, the Court should not hesitate to reformulate the rule. In our submission, a reasoned cost-benefit analysis of the exclusionary rule compels the conclusion that it should no longer be applied in those situations in which a reasonably well-trained police officer should not have known that the search and seizure in question violated the Fourth Amendment or in which the violation did not substantially affect the rights of the subject of the search. Preliminarily, however, we suggest that this is a situation ill-suited to a strictly even-handed weighing of costs and benefits. By excluding unquestionably relevant evidence, the exclusionary rule operates in precisely the opposite manner

from what we ordinarily demand of rules of evidence. Thus, its benefits should not simply be presumed; they must, instead, be convincingly demonstrated if they are to overcome the indisputable costs. Accordingly, the exclusionary rule cannot rationally be retained in those circumstances where it is thought simply that it *might* produce some benefit. Similarly, the rule should not be retained merely because it appears that no better deterrent to police misconduct currently exists; the rule must carry its own weight through demonstrable evidence that it operates in the manner intended.

a. The principal benefit claimed for the exclusionary rule is its deterrent effect. Unfortunately for the proponents of the rule, however, it has never been empirically proven that the exclusionary rule is an effective deterrent in the absolute sense, or even that it is a relatively more effective deterrent than alternative, less draconian, Fourth Amendment remedies. And even if one accepts the intuitively plausible but unproven assumption that the rule is capable of deterring police misconduct to some extent, it is readily apparent as a matter of logic that the deterrent potential of the rule is drastically reduced, if not wholly eliminated, when it is invoked to suppress evidence obtained by a reasonably well-trained police officer unaware that his conduct violated the Fourth Amendment.

The cases now before the Court demonstrate that in certain circumstances the rule is both inappropriate and ineffective as a deterrent device. In *Quintero*, the police could not reasonably be expected to have known that the state supreme court would later hold that they lacked probable cause to arrest as a burglary suspect a stranger to the neighborhood found attempting to hide a television set under his shirt, and

unable to produce any identification or satisfactorily answer routine questions. On the contrary, many reasonable people would surely have considered the police derelict in their duty had they failed to arrest Quintero on the spot. Application of the exclusionary rule in this case is thus ineffective, because of the greatly diminished potential for deterrence when the police conduct themselves in a manner they reasonably believe to be lawful, and inappropriate, because society has little interest in "deterring" the police from solving or preventing crime under circumstances in which the Fourth Amendment violation, if any, could not reasonably have been predicted.

Quintero thus demonstrates the need for a "reasonable mistake" modification to the exclusionary rule in the case of warrantless searches and seizures. *Sheppard* and *Leon*, on the other hand, present the Court with its first real opportunity to consider whether there is *any* justification for application of the exclusionary rule to situations involving judicial mistakes. The rule's purpose is to deter *police* misconduct, and *Leon* demonstrates that that purpose cannot be advanced when law enforcement officers have done exactly what is demanded of them by obtaining a judicial search warrant and acting according to its terms. It is irrational to assume that police officers can be meaningfully deterred from future "unlawful" conduct when, at the time of the conduct in question, they had the authorization of a warrant obtained in the reasonable belief that there existed probable cause for the search and seizure in question. As has been often noted, the suppression of evidence that occurs when a higher court overturns a magistrate's finding of probable cause does not involve any police misconduct that needs to be deterred; all that is involved is disagreement among judges about subtle and ever-

changing principles of law. There is no rational justification for applying the exclusionary rule to these situations, which bear not the slightest relationship to the egregious police misconduct for which the rule was first devised.

Finally, the type of error that occurred in *Sheppard* was, in the circumstances of the particular case, harmless beyond question. No doubt there are circumstances in which failure to specify the items to be seized *could* lead to serious Fourth Amendment abuses. But that is not what happened here. Instead, it is undisputed that there was probable cause for the search, that the judge thought he was authorizing the search that was properly described in the police application, and that the police conducted the search in exactly the same manner that they would have if their application had been attached to or incorporated by reference in the warrant. Under these circumstances, the harmless error rule is appropriately invoked to avoid the draconian consequences of suppression.

b. The presumed benefits of the exclusionary rule, which are substantially diluted if not entirely absent in cases like the instant ones, must be weighed against the rule's undeniable costs. Those costs are readily catalogued:

First, the exclusionary rule excludes from consideration at trial the very evidence that is most relevant and trustworthy. The resulting distortion of the truth-finding process of adversary adjudication requires justification of the highest order.

Second, when applied in circumstances in which significant deterrence of future misconduct is unlikely, the rule benefits only those who otherwise would be found guilty; it allows "[t]he criminal * * * to go free because the constable has blun-

dered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, cert. denied, 270 U.S. 657 (1926). The available data demonstrate that the rule, where invoked, has a substantial effect on the prosecution's ability to obtain convictions. Moreover, the effects of the rule are felt most heavily in drug cases involving defendants who, following dismissal of their narcotics charges because of the suppression of dispositive evidence, often go on to commit other crimes, frequently crimes of violence. The rule affords no remedy, however, for the innocent victims of unlawful police conduct, who are or should be the very persons most deserving of protection.

Third, and irrespective of the actual number of guilty defendants set free by virtue of the rule, its application necessarily exacts a high cost in diminished public respect for the judicial system. The public perception that there is something wrong with a system of criminal justice that frees guilty defendants on "technicalities" cannot lightly be ignored.

Fourth, and of particular relevance to the instant cases, the rule lacks the essential ingredient of proportionality when applied to marginal Fourth Amendment violations. It utterly fails to take into account the actual existence of police misconduct that is perceived as such by the public and that is within the core proscriptions intended by the Framers of the Fourth Amendment. Behavior that a reasonably well-trained officer could not be expected to have known violated the Fourth Amendment is subject to the same draconian "remedy" as the most flagrant abuse of police power.

Fifth, granting for purposes of argument the premise that application of the rule to conduct close to the often indistinct boundary between lawful and unlawful searches would meaningfully deter some

marginally improper police conduct (see *United States* v. *Johnson*, 457 U.S. 537, 560-561 (1982)), in this class of cases the rule is, almost by definition, as likely to deter proper as improper conduct. Thus, one of the gravest costs of relentless application of the rule to honest police mistakes is not merely that "the criminal * * * [shall] go free because the constable has blundered," but that the crime shall go undetected (or, worse, unprevented) because the exclusionary rule has deterred the officer from the *lawful* performance of his duties.

Sixth, the present rule substantially strains the judicial system by encouraging the filing of suppression motions irrespective of whether there is even the slightest evidence of serious police misconduct. The windfall benefits of the rule to the guilty defendant are so overwhelming as to completely negate the process of self-screening and evaluation on the part of criminal defense counsel. A country whose judicial system is as seriously overloaded as ours can ill-afford the continued application of a rule that fosters such vast amounts of make-work.

Finally, the rule actually diminishes the Fourth Amendment by making judges reluctant to condemn questionable practices because of the extreme consequences—total suppression of unquestionably relevant and frequently dispositive evidence and the release, unpunished, of a dangerous offender.

c. While the trilogy of cases now before the Court serves to demonstrate some of the varying situations in which a "reasonable mistake" exception to the exclusionary rule would be appropriate, many of the practical details relating to the operation of such an exception may be left to future cases and initial development by lower courts. For now, it is sufficient to note that the most commonly-voiced objections to a

reasonable mistake exception are lacking in substance. For example, it has been claimed that the proposed exception would "put a premium on police ignorance" because the incentive for thorough police training in the requirements of the Fourth Amendment now provided by the exclusionary rule would be lost. This objection is a palpable strawman. The reasonableness of a police officer's actions would be tested by the objective standard of what should be expected of the reasonably well-trained law enforcement official. Thus, a reasonable mistake exception would preserve every incentive for police departments to ensure that their officers remain current with the development of Fourth Amendment law.

Moreover, the objective nature of the inquiry will protect the judicial system against unduly burdensome and generally irrelevant inquiries into the subjective state of mind of a particular officer. In most cases, a court will need to determine only whether a reasonably well-trained officer should have known, in light of the extant principles of law, that his conduct was prohibited. The inquiry thus will not be markedly different from that required of a court in deciding a suppression motion.

It is also sometimes suggested that the exclusionary rule needs to be retained in its present form, or even expanded, so as not to "freeze" the development of Fourth Amendment law. Of course, it is not entirely clear that society is greatly benefitted by having courts continue to decide every question that inventive lawyers can devise, particularly when "the general principles applicable to claims of Fourth Amendment violations are well settled * * *." *Arkansas* v. *Sanders*, 442 U.S. 753, 757 (1979). But, in any event, there need be no serious concern that adoption of a reasonable mistake exception to the exclusionary rule

would bring a halt to the adjudication of substantive Fourth Amendment issues. Many unsettled questions of Fourth Amendment law are amenable to adjudication in suits for declaratory or injunctive relief or in damages actions against municipalities. In addition, as demonstrated by the number of nonmeritorious suppression motions currently filed, criminal defendants can be counted upon to assert every defense available to them. Because the substantial windfall of exclusion would remain available to those defendants who could show demonstrably unreasonable police conduct, it is unrealistic to assume that defendants with colorably meritorious claims of Fourth Amendment violations will lose their incentive to litigate (although we anticipate that there would be a considerable reduction in the number of frivolous claims).

There is, moreover, no jurisprudential impediment to a court's deciding a question of substantive Fourth Amendment law before determining the applicability in a particular case of a reasonable mistake exception to the exclusionary rule. Such a practice would be entirely consistent with the customary approach of deciding questions of rights first, and then turning to questions of remedies. Indeed, it is a common feature of current jurisprudence, with appellate courts first considering an appellant's claim of error and then determining whether the error was harmless. Accordingly, whether to assume the existence of a Fourth Amendment violation and decide only the question of reasonable mistake, or whether to decide the substantive question first, should be left to judicial discretion. It might well be appropriate for courts to decline to adjudicate nonrecurring fact-bound questions concerning the propriety of a particular search and seizure if application of a reasonable mistake exception would

be sufficient to dispose of the case. On the other hand, courts would remain free to decide significant unsettled questions of law or to adjudicate particularly problematic or recurring factual situations that give cause for concern.

Finally, it has been suggested that, whatever the flaws of the exclusionary rule, it must be retained because there is no adequate alternative. This is, we submit, insufficient justification for a rule that carries the heavy costs of the exclusionary rule in the class of cases here considered. Moreover, the continued existence of the rule may well operate to deter the development of more efficacious and less costly alternatives. Accordingly, the time has come for recognition by this Court that, in the category of cases here under consideration, the exclusionary rule is entirely unjustified, if not actually detrimental to the achievement of the goals of the Fourth Amendment.

ARGUMENT

I. AS A JUDICIALLY CREATED RULE OF EVIDENCE, THE EXCLUSIONARY RULE MAY APPROPRIATELY BE MODIFIED IN THE LIGHT OF EXPERIENCE

This Court first required the exclusion of evidence obtained in violation of the Fourth Amendment in *Weeks* v. *United States*, 232 U.S. 383 (1914), a case involving successive, warrantless searches by federal agents of an accused's home, which resulted in the seizure of letters and other personal documents. Later, in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the Court extended the application of the Fourth Amendment exclusionary rule to the states in the context of a case involving a forcible, warrantless entry into a suspect's home that was followed by an exploratory search through personal papers and effects. Since that

time, however, the exclusionary rule has been increasingly criticized as "both conceptually sterile and practically ineffective in accomplishing its stated objective" of ensuring compliance with the Fourth Amendment by law enforcement officials. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). Accordingly, members of the Court have repeatedly urged a general reconsideration of the exclusionary rule and the situations in which it is applied. *Id.* at 415-416, 420-421; see also *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 9-22 (White, J., concurring); *Robbins* v. *California*, 453 U.S. 420, 437, 443-444 (1981) (Rehnquist, J., dissenting); *California* v. *Minjares*, 443 U.S. 916, 917 (1979) (Rehnquist, J., dissenting from denial of stay); *United States* v. *Ceccolini*, 435 U.S. 268, 283 (1978) (Burger, C.J., concurring); *Brewer* v. *Williams*, 430 U.S. 387, 413-414 n.2 (1977) (Powell, J., concurring); *Stone* v. *Powell*, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); *id.* at 537-539 (White, J., dissenting); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 271 (1973) (Powell, J., concurring); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 490 (1971) (Harlan, J., concurring).

The instant cases offer appropriate vehicles for such a reevaluation of the scope of the exclusionary rule. In *Leon*, the record establishes that the police officers obtained a search warrant after making a detailed submission to a state court judge based on both a tip and corroborating information obtained during a month-long investigation of the tip. Thereafter, the officers executed the warrant according to its terms. As was recognized by the district court and by Judge Kennedy in dissent, the officers "laid a meticulous trail" (Pet. App. 14a) by conducting their

investigation "with care, diligence, and good faith" (*id.* at 5a). Including the issuing judge, five judges have examined the officers' application for a warrant, and they have divided three to two on the existence of probable cause. Under such circumstances, it seems wholly unreasonable to suppose that the police can be deterred from making a similar "mistake" in the future.

In *Sheppard*, the officers relied on a search warrant that was without question supported by probable cause. Granting that the warrant was defective because it failed to specify the items to be seized, those items nevertheless were correctly identified in the police officer's application for the warrant. Moreover, there is no question that the issuing judge knew and approved of the precise scope of the search that the police intended to conduct, or that the search was in fact so confined. See 82-963 Pet. App. A10-A16. Thus, highly probative evidence was suppressed because exigent circumstances surrounding issuance of the warrant resulted in the incomplete adaptation of boilerplate language in a form warrant. The fundamental values that the Fourth Amendment protects were in no way compromised, while society's equally compelling interest in convicting the guilty was dealt a needless blow.

In *Quintero*, police officers responded to a citizen's report of a possible burglary. The police found the suspect, a stranger to the neighborhood, standing at a corner bus stop in his undershirt, having placed his shirt over a television set. The suspect had no identification and told the police that he had paid someone $100 for the television set. Later that day, residents of the neighborhood reported that their house had been burglarized, and they identified items recovered from the defendant as items that had been

taken from their home. See 82-1711 Pet. App. 2-5. The Supreme Court of Colorado held that the police lacked probable cause to arrest respondent, although the majority apparently believed that probable cause would have been present if the police had had in their possession one additional fact—actual knowledge that a burglary had been committed. In our view, it is readily apparent that many reasonable persons would consider the police to have been derelict in their duty had they failed to arrest respondent simply because the victims of the burglary had not yet discovered what was obvious to the police—that a thief had made off with their property. But even assuming that the state court correctly determined the probable cause issue, it is unrealistic to suppose that the court's decision provides a useful guide to future police conduct. Cases such as *Quintero* highlight the impossibility of reliably providing precise guidance to the officer in the field confronted with a close probable cause issue; while an officer with an encyclopedic memory for the details of vast numbers of judicial decisions will, should he ever happen upon *precisely* the same facts, know that an appellate court has found them lacking, even the slightest variation in the facts could lead to a different result that the officer could not be expected to glean from decisions such as that in this case. Under such circumstances, the principal "lesson" learned by the police is that appellate oversight of the factual determinations that an officer must make in the daily performance of his duty offers an uncertain and basically unpredictable guide to future conduct.

Thus, in each of the cases now before the Court, the officers' conduct stands on a far different footing from the palpably unlawful searches at issue in *Weeks* and *Mapp*. The suppression remedy does not mean-

ingfully protect against the arbitrary invasion of privacy interests—the core value safeguarded by the Fourth Amendment—when, as in the instant cases, law enforcement officers have acted in the reasonable belief that their conduct complies with constitutional standards. Modification of the exclusionary rule to acknowledge this point is consistent with the fundamental purpose of the rule and the cases of this Court explicating it.

A. The Only Viable Justification For The Exclusionary Rule Is Its Presumed Deterrent Effect On Unlawful Police Conduct

Nothing in the Fourth Amendment or any other provision of the Constitution either directly or implicitly provides for the exclusion of illegally seized evidence from criminal trials. Although the plurality opinion in *Mapp*, 367 U.S. at 649, 651, 655-656, suggested that an absolute exclusionary rule is constitutionally required, the Court has never so held. Nevertheless, because the exclusionary rule was first conceived in the context of flagrantly unlawful police conduct and later extended to the states in a case involving even more abusive practices, it is not surprising that, for many years, the Court appeared to assume that the Fourth Amendment required an absolute prohibition against the use of illegally obtained evidence. As the Court has come to focus more clearly on the true purpose of the exclusionary rule and the effect it is likely to have in differing contexts, however, it has recognized that the rule is merely a judge-made rule of evidence—constitutionally based but not specifically constitutionally required—the contours of which must be adapted to fit the circumstances. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974); *Desist* v. *United States*, 394 U.S. 244, 254

n.24 (1969); see also *Stone* v. *Powell*, 428 U.S. at 542 (White, J., dissenting); *Wolf* v. *Colorado*, 338 U.S. 25, 39-40 (1949) (Black, J., concurring) (rule "is a judicially created rule of evidence").[6]

Accordingly, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone* v. *Powell*, 428 U.S. at 486. Because of the inherent trustworthiness of seized tangible evidence and the resulting societal costs from its loss through suppression, application of the exclusionary rule has been carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. Thus, any consideration of the extent to which the rule should be modified must begin with a clear understanding of its purpose.

Over time, the justifications advanced in support of the exclusionary rule have varied, but it is now clear that the principal, and certainly the only logical purpose of the rule is to deter Fourth Amendment violations by law enforcement officers by removing the incentive to commit those violations. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. at 486; *United States* v. *Janis*, 428 U.S. 433, 446 (1976). The Court summarized the rule's deterrent purpose succinctly in *Elkins* v. *United States*, 364 U.S. 206, 217 (1960):

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively

[6] As one commentator put it, "the exclusionary rule does not 'look' like a constitutional doctrine. * * * [It] is merely one arbitrary point on a continuum between deterrence of illegal police activity and conviction of guilty persons." Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1030 (1974).

available way—by removing the incentive to disregard it.

The rise to preeminence of the exclusionary rule's deterrent purpose reflects the abandonment of earlier justifications. Initially, the rule was justified as a remedy for the violation of an accused's personal Fourth Amendment right of privacy. *Weeks*, 232 U.S. at 398. This rationale has since been repeatedly and squarely rejected by the Court (*e.g.*, *Calandra*, 414 U.S. at 347; *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965)), and with ample reason. The exclusionary rule is fundamentally irrational as a remedy for unlawful invasions of privacy, both because it utterly fails to succor those most deserving of a remedy—the innocent victims of unreasonable searches—and because, as Judge Friendly has said in an observation particularly apt in cases like these of marginal illegality, "the benefit received [exclusion of evidence proving the defendant's guilt] is wholly disproportionate to the wrong suffered." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 951 (1965).

Another early rationale for the exclusionary rule was that it served to safeguard the purity of the courts' processes by forbidding the introduction of tainted evidence. See *Elkins*, 364 U.S. at 222-223. But the "imperative of judicial integrity" has not in fact served as the basis for deciding cases. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 669 (1970). The Court has recognized that the strength of this rationale has been steadily eroded by a series of decisions permitting the collateral use of unlawfully seized evidence. See pages 34-38, *infra*. Thus, preserving the courts' distance from tainted evidence has now been eclipsed by, and indeed subsumed within, the policy of deter-

rence: to the extent that the judicial integrity rationale was intended to insulate the courts from becoming partners in lawless government conduct, that function is fully served by the policy of deterrence. See *Janis*, 428 U.S. at 458-459 n.35; *Stone* v. *Powell*, 428 U.S. at 484-485; *United States* v. *Peltier*, 422 U.S. 531, 536-538 (1975).

But even if the "imperative of judicial integrity" had survived as an independent justification for the exclusionary rule, it would not be impugned by the "reasonable mistake" exception that we propose (see pages 44-45, 47-49, 65-68, *infra*). As the Court recognized in *Peltier*, 422 U.S. at 537-538, "the 'imperative of judicial integrity' is * * * not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." Indeed, we suggest that judicial integrity is put in greater jeopardy by the rendition of erroneous verdicts caused by the suppression of dispositive evidence than it is by the admission of evidence that a reasonably well-trained police officer could not have been expected to know was being obtained in violation of the Fourth Amendment.

B. The Policy Of Deterrence Dictates A Cost-Benefit Approach To The Application Of The Exclusionary Rule

Recognition that the policy of deterrence is the only logical justification for the exclusionary rule has governed the Court's consideration of a multitude of applications of the rule. Because "the exclusion of evidence is not a personal constitutional right but a remedy," the judiciary "must be sensitive to the costs and benefits of its imposition." *Gates*, slip op. 11-12

(White, J., concurring). Indeed, this Court has long engaged in a cost-benefit analysis when it has confronted suggested expansions of the rule or has examined afresh the propriety of certain applications of the rule. For example, in *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969), the Court ruled that suppression may be sought only by one whose own Fourth Amendment rights have been violated. The Court concluded that any additional benefits that might flow from extending the suppression remedy to persons not themselves the victims of unlawful searches and seizures were offset by "the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Id.* at 175. See also *United States* v. *Salvucci*, 448 U.S. 83, 94-95 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980); *United States* v. *Payner*, 447 U.S. 727, 731-734 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 137 (1978).[7]

Similarly, the Court's recognition of the permissible use of unlawfully seized evidence as an impeachment tool rests on the conclusion that any furthering of the deterrent purpose of the exclusionary rule would be more than offset by the interference with the truth-finding function of criminal trials. See *United States* v. *Havens*, 446 U.S. 620 (1980); *Walder* v. *United States*, 347 U.S. 62 (1954); see also *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971). In reaching this conclusion, the Court

[7] These decisions would not be sustainable if the "imperative of judicial integrity" were a substantial independent basis for the exclusion of illegally obtained evidence, because the impact on judicial integrity of such use does not depend in the least upon whether the particular defendant's rights were infringed in procuring the tainted evidence.

noted in *Havens* that any increase in deterrence occasioned "by forbidding impeachment of the defendant who testifies [is] deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial" (446 U.S. at 627).

Likewise, the Court has refused to apply the exclusionary rule when the initial illegality has become attenuated. *E.g., United States* v. *Ceccolini*, 435 U.S. at 280. Again, a cost-benefit analysis controlled the outcome of the case (*ibid.*):

> The cost of permanently silencing [a live witness] is too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect.

The Court also has employed a cost-benefit analysis in determining whether to apply the exclusionary rule to various types of proceedings other than the criminal trial itself. In *Calandra*, the Court refused to prohibit the use of illegally seized evidence in grand jury proceedings. In reaching this result, the Court stated (414 U.S. at 351-352; footnote omitted):

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. * * * We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.

A like analysis was employed in *Stone* v. *Powell*, 428 U.S. at 482-495, where the Court held that the substantial costs to society of the suppression remedy would outweigh any marginal deterrent effect that might follow from permitting state prisoners to re-

litigate search and seizure claims in federal habeas corpus proceedings. And in *Janis*, 428 U.S. at 454, the Court concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion."

Finally, the Court has employed the same balancing analysis when considering whether Fourth Amendment decisions should be applied retroactively. See, *e.g.*, *Peltier*, 422 U.S. at 538-539; *Williams* v. *United States*, 401 U.S. 646, 654-655 (1971) (plurality opinion); *Desist* v. *United States*, 394 U.S. at 249-250; *Linkletter* v. *Walker*, 381 U.S. at 636-639.[8] In these cases, the Court has recognized that retroactive application of new Fourth Amendment standards cannot meaningfully promote the deterrent purpose of the exclusionary rule.

In short, the Court has steadfastly declined to apply the exclusionary rule in circumstances in which the degree of incremental deterrence that suppression might provide is outweighed by the attendant societal costs.[9] This cost-benefit approach is a necessary corol-

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[8] To the extent that *United States* v. *Johnson*, 457 U.S. 537 (1982), may be read as a departure from these cases, we suggest that it reflects only the Court's concern with according fundamental fairness for persons similarly situated rather than any general retreat from the balancing analysis that the Court has consistently employed in the context of the exclusionary rule.

[9] Using the same reasoning, lower federal courts have placed similar limitations on the application of the exclusionary rule. See, *e.g.*, *Donovan* v. *Federal Clearing Die Casting Co.*, 695 F.2d 1020 (7th Cir. 1982) (exclusionary rule inapplicable to evidence seized by Occupational Safety and Health Administration pursuant to subsequently-invalidated search warrant);

lary to the fact that deterrence is the only logical justification for the rule.

II. THE COSTS OF THE EXCLUSIONARY RULE OUTWEIGH ITS BENEFITS WHEN IT IS APPLIED TO SUPPRESS EVIDENCE OBTAINED IN A SEARCH AND SEIZURE THAT A REASONABLY WELL-TRAINED OFFICER WOULD NOT HAVE RECOGNIZED AS A VIOLATION OF THE FOURTH AMENDMENT

After nearly 70 years of experience with the exclusionary rule, it is now appropriate for the Court to employ the same type of cost-benefit analysis utilized in the past in evaluating particular applications of the rule (see pages 34-38, *supra*) to a consideration of the wisdom of its application to reasonable mistakes. Preliminarily, however, we suggest that this weighing is not properly performed on scales that are evenly balanced. By excluding unquestionably reliable and relevant evidence, the exclusionary rule operates in precisely the opposite manner from what we gen-

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Tirado v. *Commissioner*, 689 F.2d 307 (2d Cir. 1982) (evidence unlawfully seized by federal narcotics agents admissible in a federal civil tax proceeding; unlikely that narcotics agents would be deterred by prospect that illegally seized evidence might be unavailable in a future tax proceeding); *United States* v. *Lee*, 540 F.2d 1205, 1211 (4th Cir.), cert. denied, 429 U.S. 894 (1976) (exclusionary rule inapplicable to sentencing proceedings); *United States* v. *Schipani*, 435 F.2d 26, 28 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971) (same); *United States* v. *Bazzano*, No. 81-1936 (3d Cir. June 17, 1983) (en banc) (exclusionary rule inapplicable at probation revocation hearings); *United States* v. *Winsett*, 518 F.2d 51, 53-55 (9th Cir. 1975) (same); *United States* v. *Hill*, 447 F.2d 817, 818-819 (7th Cir. 1971) (same); *United States ex rel. Sperling* v. *Fitzpatrick*, 426 F.2d 1161, 1163-1164 (2d Cir. 1970) (same). But see *Lopez-Mendoza* v. *Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983) (en banc) (exclusionary rule applicable in civil deportation proceedings).

erally demand of other rules of evidence. See, *e.g.*, C. McCormick, *Handbook of the Law of Evidence* § 72 (E. Cleary ed. 1972). Thus, the rule's benefits should not simply be presumed; the rule's application to particular classes of cases requires more than an assumption that it *might* have the desired deterrent effect. As the Chief Justice observed in his concurrence in *Stone* v. *Powell*, 428 U.S. at 499-500:

> To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention * * * to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law. * * * The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade.

Similarly, Justice White stated in his *Gates* concurrence (slip op. 12):

> [A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness.

See also Wilkey, *The Exclusionary Rule: Costs and Viable Alternatives*, 1 Crim. Just. Ethics 16, 20 (1982). In any event, as we shall now demonstrate, such an analysis reveals that the costs of the rule far outweigh its presumed benefits when applied to police actions that may in retrospect be deemed illegal but would not have been recognizable as such to a reasonably well-trained officer. Accordingly, the Court should have no hesitation in fashioning an appropriate exception to the rule.

A. The Presumed Benefits Of The Exclusionary Rule Are Not Realized By Applying It To Suppress Evidence Obtained In Searches Or Seizures That Were Not Recognizably Violative Of The Fourth Amendment

1. The principal benefit claimed for the exclusionary rule is its deterrent effect. Unfortunately for the rule's proponents, however, its deterrent effect has never been proven, either in an absolute sense or relative to alternative, less costly means of enforcing the Fourth Amendment. The Court itself has acknowledged the lack of reliable empirical evidence to support the deterrent effect of the exclusionary rule. In *Wolf* v. *Colorado*, 338 U.S. 25, 44 n.5 (1949) (Murphy, J., dissenting), Justice Murphy argued that his own "statistical study" of police chiefs supported a broadened application of the rule.[10] Several years later, however, the Court observed that "[t]here is no reliable evidence known to us that inhabitants of those states which exclude the [tainted] evidence suffer less from lawless searches and seizures than those of states that admit it." *Irvine* v. *California*, 347 U.S. 128, 136 (1954). See also *Elkins*, 364 U.S. at 218 ("it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule").

Since *Mapp*, of course, there have been no meaningful comparative statistics showing the effect the exclusionary rule has had upon police conduct. See *Janis*,

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[10] Justice Murphy's study consisted of 26 replies to a questionnaire he himself sent to the police chiefs of 38 large cities. Only those replies "of any significance" were discussed in the text of his dissenting opinion (338 U.S. at 44 n.5). However commendable Justice Murphy's attempt to gather empirical evidence may have been, he himself recognized the need for more comprehensive research (*ibid.*).

428 U.S. at 452 & n.24. The Court has noted twice in recent years that the available empirical studies are virtually useless. *Stone* v. *Powell*, 428 U.S. at 492 & n.32; *id.* at 498-499 (Burger, C.J., concurring); *Janis*, 428 U.S. at 449-453. This situation is not surprising in view of the manifest difficulty of designing and implementing an adequately controlled comparative study that could produce objectively valid results.

The commentators, like this Court, have concluded that there is no reliable evidence to support the proposition that the exclusionary rule operates effectively to deter police misconduct. The author of the leading empirical study on the question has concluded (Oaks, *supra*, 37 U. Chi. L. Rev. at 755):

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective.

Thus, the rule cannot be reliably shown to fulfill the only purpose that justifies its implementation. Nevertheless, we accept as intuitively plausible (even if not empirically demonstrated) the premise that suppression of evidence in a criminal trial can to some extent or in some circumstances deter law enforcement officers from violations of the Fourth Amendment. What is pertinent to the present inquiry is how well, if at all, deterrence can operate in the "reasonable mis-

take" context. It seems apparent that the degree of deterrence achieved by the exclusionary rule is likely to vary in relation to two factors: the extent to which imposition of the suppression sanction is "painful," and the extent to which the officer can predict at the time he acts that his action is improper and therefore likely to lead to imposition of the sanction. Cases such as *Calandra*, *Stone* v. *Powell*, *Janis*, and *Havens* turn upon the Court's assessment of the first of these factors; they reach the result they do because it appeared unlikely to the Court that police officers would be encouraged to engage in prohibited conduct by the availability of the particular uses of unlawfully seized evidence there permitted. Thus, any speculative deterrent effect was clearly outweighed by the evident costs of suppression.

The present cases call upon the Court to evaluate the second factor, *i.e.*, whether deterrence will be too slight to justify the costs of suppression when the conduct in question is of a sort that a reasonably well-trained officer would not recognize to be unlawful. In advancing the contention that exclusion of evidence is unjustified in such circumstances, we do not (and need not) go so far as to suggest that adoption of a reasonable mistake exception would have no effect at all on the presumed deterability of Fourth Amendment violations. Perhaps it is tenable to suppose that, if police are responsive to the suppression sanction, then the more sweeping and stringent the use of the sanction, the more cautious they will be in cases in which there is any room for doubt about the legality of a proposed search or seizure, a point the Court made in *United States* v. *Johnson*, 457 U.S. at 560-561.

But the mere fact that some deterrence may be postulated plainly cannot control the inquiry here. If

it did, the Court's decisions imposing the "standing" requirement, for example, would be totally untenable; it is, after all, hardly disputable that a rule allowing *any* defendant to obtain suppression would be far more likely to deter than one excluding the fruits of searches that were not recognizably illegal at the time they were undertaken. The question, in short, does not turn merely upon identification of some reasonable possibility of deterrence, but requires an evaluation of the substantiality of the anticipated deterrence. As the Court noted in *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974):

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in good faith, however, the deterrence rationale loses much of its force.

Similarly, in *Peltier*, 422 U.S. at 542, the Court stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

See also *Janis*, 428 U.S. at 458-459 n.35; *United States* v. *Mahoney*, No. 82-1452 (5th Cir. Aug. 22, 1983), slip op. 6707 ("[T]here may be benefit in uniformly applying the exclusionary rule such that legal-

ity is the sole index of exclusion. Those benefits bear in our view too great a price").

2. Experience teaches that Fourth Amendment violations vary greatly in their gravity and, we submit, in their amenability to deterrence. At one end of the spectrum, when officers have made Fourth Amendment intrusions under circumstances "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or engaged in law enforcement activities that constitute "flagrantly abusive violation[s] of Fourth Amendment rights," "the deterrent value of the exclusionary rule is most likely to be effective." *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring).[11] By contrast, when there is merely a "tech-

[11] "[T]he object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal—where there was no reasonable cause to believe there was reasonable cause." H. Friendly, *Benchmarks* 261 (1967) (footnote omitted). See also Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 Tex. L. Rev. 736, 744-745 (1972).

In accord with that sentiment, the ALI's *Model Code of Pre-Arraignment Procedure* § SS 290.2(2) (1975), provides that "[a] motion to suppress evidence * * * shall be granted only if * * * the violation upon which it is based was substantial * * *." In turn, the substantiality of a violation is to be determined from a consideration of "all the circumstances" of a case (*id.* § SS 290.2(4)), except in those situations where a violation is "gross, wilful and prejudicial to the accused" or "appears to be part of the practice of the law enforcement agency" (*id.* § SS 290.2(3)). As one commentator has stated, "the purpose of the test is to invite courts to reconsider the need for exclusion where the fourth amendment violation is relatively minor and is neither willful nor reflective of agency policy or general indifference to individuals' rights." Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1423 (1981) (footnote omitted).

nical" violation of Fourth Amendment rights occasioned by actions that a reasonably well-trained police officer would not recognize as impermissible, "the deterrence rationale of the exclusionary rule does not obtain," and there is accordingly "no legitimate justification for depriving the prosecution of reliable and probative evidence." *Id.* at 611-612.

In our view, if the exclusionary rule is to function tolerably in our society, it must take account of these differences. Thus, we endorse Justice White's opinion (*Stone* v. *Powell*, 428 U.S. at 538 (White, J., dissenting)) that

> the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed.

See also *Gates*, slip op. 1, 12 (White, J., concurring).

This type of focused exception responsive to the policies of the exclusionary rule has been expressly adopted by the Fifth Circuit. *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981). There, a federal agent who had previously arrested Williams in Ohio for a narcotics violation encountered her in Georgia. The agent knew that a condition of Williams' release on bond pending appeal was that she remain in Ohio. Accordingly, the agent arrested Williams for violating this condition and, in ensuing searches incident to the arrest, seized heroin from Williams' possession.

Sitting en banc, the Fifth Circuit held unanimously that the district court should not have suppressed the heroin. One majority of the court held that the federal agent had legal authority to arrest Williams because, by violating the conditions of her bail release, she had committed the crime of contempt of court in the agent's presence (622 F.2d at 836-839). A different, overlapping majority of the court held that, irrespective of the validity of Williams' arrest, the heroin should not have been suppressed because the agent had acted in good faith in arresting and searching Williams, and could not reasonably be expected to have known that there was serious doubt concerning his authority to make the arrest. Because the purpose of the exclusionary rule is to deter "willful or flagrant actions by police, not reasonable, good-faith ones" (*id.* at 840), the court concluded that it made no sense to suppress evidence in these circumstances, "unless we somehow wish to deter [police officers] from acting at all" (*id.* at 842). The court noted that its decision was fully consistent with this Court's cost-benefit approach to the exclusionary rule (*id.* at 842-843; citations omitted; emphasis added):

> Any slight deterrent effect of excluding fruits of good-faith arrests is *even less* than the small deterrence from suppressing the fruits of illegal police actions that are attenuated in effect, that are challenged in habeas corpus petitions on fourth amendment grounds, that are used in grand jury deliberations, or that are used for impeachment. Yet the Supreme Court has found that the deterrent effect of exclusion in the examples listed and others does not justify the societal harm incurred by suppessing relevant and incriminating evidence. The good-faith exception

that we explicitly recognize today is of a kind with these.[12]

3. The "reasonable mistake" exception to the exclusionary rule that we advocate will be appropriate

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[12] The Fifth Circuit has recently applied the *Williams* rule in *United States* v. *Mahoney*, No. 82-1452 (Aug. 22, 1983). Other courts have adopted similar rules. See *United States* v. *Ajlouny*, 629 F.2d 830, 840-841 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981) (even if warrantless national security wiretap was unlawful, suppression not required where agents acted in good faith and could not be charged with knowledge that their conduct was improper); *United States* v. *Nolan*, 530 F. Supp. 386, 396-399 (W.D. Pa. 1981) (suppression not required for what was, at most, a technical, good faith violation of the knock-and-announce rule); *United States* v. *Wilson*, 528 F. Supp. 1129, 1132 (S.D. Fla. 1982) (even if arrest effectuated outside of officers' territorial jurisdiction was not a lawful citizen's arrest, good faith exception bars suppression of marijuana); *Gifford* v. *State*, 630 S.W.2d 387, 391 (Tex. Crim. App. 1982) (suppression not required where officers relied in good faith on a search warrant later found to be technically defective); *People* v. *Adams*, 53 N.Y.2d 1, 9-10, 422 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881-882 (1981) (suppression not required where agent relied in reasonable good faith on purported authority of accused's girlfriend to consent to a search of his apartment); cf. cases cited at pages 37-38 note 9, *supra*.

A number of legal commentators have joined the Fifth Circuit and other courts following its lead in noting the absence of any meaningful deterrent effect when police officers have acted in the reasonable belief that their conduct was lawful. See, *e.g.*, Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 Crim. Just. Ethics 35, 37-38 (1982); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1380 (1981); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 650 (1978); Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1044 (1974).

in a variety of factual settings, not all of which can or should be precisely mapped out at this stage of the development of the exception. But the facts in *United States* v. *Williams* and in *Quintero* well illustrate two situations in which the exclusionary rule should be modified to accommodate the practical realities of police work. In *Williams*, the officer was required to make an on-the-spot decision concerning the scope of his arrest powers, a legal issue that had not been judicially resolved. Irrespective of what an appellate court might ultimately announce as the correct answer to that legal question, there can be no doubt that the officer was not unreasonable in believing that he had observed the commission of a crime in his presence. Society expects the police to act in such situations, and it cannot seriously be urged that society is benefitted, or that individual constitutional liberties are meaningfully advanced, by a rule of law that causes an officer to doubt the propriety of taking action when he observes what he reasonably believes to be an offense in progress.

Similarly, in *Quintero*, the court found that the arresting officer believed he had probable cause to arrest the respondent (82-1711 Pet. App. 6); indeed, it is difficult to imagine that the officer could have believed anything else. But regardless of the "correct" answer to the probable cause issue,[13] the officer was called

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[13] In our view, it is clear that the Supreme Court of Colorado misread *Brown* v. *Texas*, 443 U.S. 47 (1979). In *Brown*, the Court held that the police had unlawfully detained Brown "[i]n the absence of any basis for suspecting [him] of misconduct" (*id.* at 52). Brown had merely refused to identify himself when stopped in an area frequented by drug traffickers; the police could articulate no objective facts suggesting that Brown was himself engaged in drug dealings or in any other criminal activity (*id.* at 49, 52). In *Quintero*, by contrast, the arresting officer did articulate (and the state supreme

upon to make an immediate judgment involving a mixed question of law and fact as to which, at minimum, reasonable persons could differ. Again, society is not benefitted by a rule of law that seeks to "deter" law enforcement officers who reasonably believe that a crime has been committed from performing their duty to make an arrest.

As the cases now before the Court demonstrate, policemen are not trained legal technicians; nevertheless, they are expected to make quick decisions, often involving complicated legal and factual analyses, "in the course of the difficult and often dangerous business of law enforcement." Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 Tex. L. Rev. 736, 741 (1972). Thus, countless officers in the field must daily decide under rapidly-changing circumstances whether there exists the requisite probable cause to support an arrest or a search, reasonable suspicion to justify an investigative detention, or exigent circumstances permitting warrantless action. In such cases, "[i]nadvertent errors of judgment" and "honest mistakes" will "inevitably occur given the pressures inherent in police work having to do with serious crimes." *Bivens*, 403 U.S. at 418 (Burger, C.J., dissenting).

The uncertainties inherent in police work are exacerbated by a lack of coherent Fourth Amendment standards that are readily recognizable and can be predictably applied by officers in the field. Too often, courts leave police officers to resolve these difficult questions for themselves, see *New York* v. *Belton*, 453

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court recited) the objective factors that led him to conclude that respondent had committed a burglary (82-1711 Pet. App. 3-7). Nevertheless, for purposes of this case, we must assume that the state supreme court correctly determined the probable cause issue.

U.S. 454, 470 (1981) (Brennan, J., dissenting), and then feel free to second-guess what appeared at the time to have been reasonable judgments. The result is that the courts have engendered a "state of uncertainty" that is "intolerable" to the officer on the beat. *Coolidge* v. *New Hampshire*, 403 U.S. at 490-491 (Harlan, J., concurring).[14] Without the ability accurately to predict how courts will resolve Fourth Amendment questions, law enforcement officers will neither know the scope of their authority nor be sufficiently deterred from improper action to justify application of the exclusionary rule. See *New York* v. *Belton*, 453 U.S. at 459-460; see also LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 Mo. L. Rev. 391, 395 (1965).[15]

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[14] As Justice Frankfurter once remarked, "the course of true law pertaining to searches and seizures * * * has not—to put it mildly—run smooth." *Chapman* v. *United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring). See also *Cady* v. *Dombrowski*, 413 U.S. 433, 440 (1973) ("this branch of the law is something less than a seamless web"). Legal commentators have agreed with these observations. See, *e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974) ("For clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product"); Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1033 (1974) (Fourth Amendment law "is so complicated and abstruse that the police often honestly and reasonably cannot determine in advance" how it will be applied); Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hastings L.J. 1065, 1092 (1982) (Fourth Amendment law marked by "sophisticated, complicated, and confusing decisions").

[15] As Professor LaFave has noted, "[t]he threat of evidence exclusion can have little impact unless decision-making officers have some basis for determining what conduct will bring about exclusion" (30 Mo. L. Rev. at 396).

There is no basis for faulting an officer who has made a reasonable but incorrect assessment regarding the existence of reasonable suspicion or probable cause or the necessity of obtaining a warrant. Fourth Amendment adjudications inevitably leave "much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. Surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest." *Stone* v. *Powell*, 428 U.S. at 540 (White, J., dissenting).[16] Justice White went on to note (*id.* at 539-540):

> [E]xperience tells us that there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men

[16] And, of course, the instances are legion in which lower courts have *erroneously* condemned officers' actions as violative of the Fourth Amendment. Indeed, last Term alone this Court reversed seven lower court decisions that had invalidated searches or seizures on Fourth Amendment grounds. *Michigan* v. *Long*, No. 82-256 (July 6, 1983); *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983); *Illinois* v. *Lafayette*, No. 81-1859 (June 20, 1983); *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983); *Illinois* v. *Gates*, No. 81-430 (June 8, 1983); *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983); *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983). See also *New York* v. *Belton*, 453 U.S. 454 (1981); *United States* v. *Cortez*, 449 U.S. 411 (1981); *Colorado* v. *Bannister*, 449 U.S. 1 (1980); *United States* v. *Ramsey*, 431 U.S. 606 (1977); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *United States* v. *Watson*, 423 U.S. 411 (1976); *Texas* v. *White*, 423 U.S. 67 (1975). Because courts are fallible human institutions, occasional mistakes are unavoidable, especially when the legal issue is close. What is unfortunate, however, is that it should frequently happen that *lawfully* seized evidence is suppressed. The rule for which we contend will greatly diminish that risk.

could easily differ on the question. It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that there was not probable cause to make the arrest and to seize the evidence offered by the prosecution. * * *

In these situations, and perhaps many others, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that in each of them the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.[17]

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[17] Lower court judges have made the same point. *E.g.*, *Government of the Virgin Islands* v. *Rasool*, 657 F.2d 582, 595 (3d Cir. 1981) (Adams, J., concurring):

> [I]t is not realistic to expect the exclusionary rule to deter misconduct on the part of police officers. Often there is no misconduct to deter or punish—the officer has simply acted reasonably in a pressured situation and is later told he guessed wrong about how Supreme Court precedents might be interpreted to apply in fine-line situations.

In a similar vein is *United States* v. *Ross*, 655 F.2d 1159, 1204 (D.C. Cir. 1981) (en banc) (footnote omitted) (Wilkey, J., dissenting), rev'd, 456 U.S. 798 (1982):

> [T]oo many prosecutions * * * have gone awry, not as a result of intentional police misconduct, and certainly not because of any doubt about the guilt of the criminal, but simply because a court, with the benefit of time to reflect and of hindsight, concludes that an officer acting under pressure in the field, maybe under fear for his own life, failed properly to apply the often confused and confusing standards of conduct set out by courts interpreting the Constitution.

Judge Wilkey also observed that in cases in which the law is not settled, courts "would have to impute to [police officers]

Quite clearly, it is in these "grey, twilight area[s], where the law is difficult for courts to apply, let alone for the policeman on the beat to understand," that the exclusionary rule is least efficacious in deterring police misconduct. *Schneckloth* v. *Bustamonte*, 412 U.S. at 269 (Powell, J., concurring).[18]

4. The reasonable mistake exception to the exclusionary rule that we advocate here is consistent with this Court's recognition of the ameliorating effects of police good faith in other Fourth Amendment contexts.[19] For example, in *Michigan* v. *DeFil-*

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nearly supernatural powers to see the future before we could charge [them] with knowledge that [their] conduct was unconstitutional" (655 F.2d at 1181).

[18] If concrete examples of the problem are necessary, one need only look to the Court's decisions in *New York* v. *Belton*, 453 U.S. 454 (1981), and *Robbins* v. *California*, 453 U.S. 420 (1981). The facts of the cases were remarkably similar. In both cases, police officers lawfully stopped a car, smelled burnt marijuana, discovered marijuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in *Robbins*, the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found 30 pounds of marijuana. In *Belton*, the officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

When the Court decided these cases, three Justices opined that both searches were legal; three Justices opined that they were both illegal; and three Justices controlled the ultimate decision that the search in *Robbins* was illegal and that in *Belton* legal. It may come as small consolation to the officer who made the search in *Robbins* that only a year later the decision was overruled in *United States* v. *Ross*, 456 U.S. 798 (1982).

[19] We speak in this brief of a "reasonable mistake" exception to the exclusionary rule, rather than a "good faith" ex-

lippo, 443 U.S. 31 (1979), a police officer made an arrest in good-faith reliance on a municipal ordinance later declared to be unconstitutional. In an ensuing search incident to the arrest, the officer seized drugs from the defendant's person. In upholding the admissibility of the seized drugs, the Court stated (*id.* at 37-38):

> A prudent officer, in the course of determining whether [the defendant] had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional. * * * [20]

Similarly, in *United States* v. *Caceres*, 440 U.S. 741 (1979), Internal Revenue agents conducted a series of "consensual electronic surveillance" encounters with a targeted taxpayer. Although internal agency guidelines required prior authorization for such surveillance, the agents failed to obtain written author-

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ception, because, as discussed later (see pages 78-80, *infra*), we believe that the test for invocation of the exception should be objective in nature. The "good faith" terminology has the unfortunate consequence of suggesting that good intentions, even if objectively unsupportable, should be the touchstone, a proposition we do not advocate. But the "good faith" cases already decided by this Court and discussed in this section of our brief all satisfy the objective standard of reasonableness that we propose and could have been decided on that basis.

[20] The Court recognized (443 U.S. at 38 n.3):

> The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the [defendant], was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

ization. Refusing to require suppression of the fruits of the unauthorized surveillance, the Court noted that "[t]he agency action, while later found to be in violation of the regulations, nonetheless reflected a reasonable, good-faith attempt to comply in a situation" in which monitoring was appropriate and would have been authorized had the request for authorization been received more promptly (*id.* at 757). So too, in *Hill* v. *California*, 401 U.S. 797 (1971), officers had probable cause to arrest Hill; however, the officers mistakenly arrested one Miller, who was present in Hill's apartment, and conducted a search incident to the arrest that disclosed evidence incriminating Hill. In upholding the validity of the seizure, the Court stated: "The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But * * * the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time" (*id.* at 803-804). And in *Franks* v. *Delaware*, 438 U.S. 154 (1978), the Court limited the circumstances in which a defendant may challenge the truthfulness of allegations in a search warrant affidavit to those effectively involving official bad faith. Thus, as the Court made clear, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth * * *. Allegations of negligence or innocent mistake are insufficient" (*id.* at 171).

5. Finally, the reasonable mistake exception to the exclusionary rule that we propose comports fully with the context in which the rule was first promulgated and then applied to the states. It has been noted that pre-*Mapp* cases frequently involved "arrogant or brazen police behavior." Schroeder, *Deterring Fourth*

Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo. L.J. 1361, 1414-1415 (1981) (footnote omitted). As we observed at the outset (see page 27, *supra*), both *Weeks* and *Mapp* involved warrantless, exploratory searches through private papers and effects. So too, many of the early cases in which the exclusionary rule was first applied involved equally egregious misconduct.[21] In keeping with this historical perspective, nothing in the modification we propose will prevent courts from excluding evidence obtained through intentional or clearly abusive police misconduct.

But it makes no sense to apply a rule of suppression that was conceived in the context of palpably egregious police misconduct to the multitude of present-day cases in which law enforcement officers make all reasonable efforts to comply with the Constitution. Police resort to the preferred warrant procedure has markedly increased in the years since *Mapp* was decided (see 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.2, at 26 (1978)), law enforcement officers have to a far greater extent become well-trained professionals, and the cases now being litigated most often probe the "grey, twilight area[s]" of Fourth Amendment law,

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[21] See, *e.g.*, *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 390-391 (1920) (prosecutor conceded "outrageous" conduct based on a warrantless documents search conducted "without a shadow of authority"); *Gouled* v. *United States*, 255 U.S. 298 (1921) (surreptitious document search); *Agnello* v. *United States*, 269 U.S. 20 (1925) (warrantless search of home as incident to an arrest that occurred blocks away); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931) (warrantless, exploratory search of documents); *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951) (warrantless search of hotel room conducted "surreptitiously and by means denounced as criminal").

rather than directly touching the core values of that constitutional protection. Against this background, neither the fundamental values of the Fourth Amendment nor the deterrent purpose of the exclusionary rule are meaningfully advanced by the suppression of evidence when law enforcement officers, even though acting without a warrant, reasonably attempt to navigate the intricate channels of Fourth Amendment law. Simply put, when law enforcement officers have acted in a manner far removed from the egregious type of conduct that the exclusionary rule was first designed to combat, their honest mistakes should not be met with the severe sanction of suppression.

B. The Reasons For Applying The Exclusionary Rule Are Most Remote When Law Enforcement Officers Have Relied On A Judicially-Issued Search Warrant

1. As we have demonstrated, the purpose of the exclusionary rule is to deter unconstitutional actions by the police. When law enforcement officers reasonably, albeit mistakenly, believe that they are acting lawfully, the potential for deterrence is drastically diminished and the social value of deterrence greatly reduced. In those circumstances, the justification for the suppression remedy vanishes. That is the situation in *Quintero*. Equally important, however, is the fact that *no* credible justification has ever been advanced for invoking the exclusionary rule when, as in *Leon* and *Sheppard*, the police have not engaged in any misconduct whatsoever, but a judicial officer has issued a search warrant that is subsequently held to be defective. "This Court has never set forth a rationale for applying the exclusionary rule to suppress evidence obtained pursuant to a search warrant; it has simply done so without considering whether Fourth Amendment interests are advanced." *Gates*,

slip op. 17 (White, J., concurring). The situation is thus remarkably similar to that presented in *Stone* v. *Powell*, in which the Court acknowledged that its prior decisions had not fully considered the extent to which the exclusionary rule should apply in federal habeas corpus proceedings (428 U.S. at 480-481 & n.15). Upon examination, of course, the Court concluded that the cost of permitting state prisoners to relitigate search and seizure issues outweighed any incremental deterrent effect that might flow from application of the exclusionary rule in that context. Here, too, the Court is presented with its first real occasion to examine the policies of the exclusionary rule as they relate to evidence obtained pursuant to a warrant. As in *Stone* v. *Powell*, should that examination reveal the absence of sufficient justification for continuing to apply the exclusionary rule in such circumstances, the Court should not hesitate to modify the rule.

2. In our submission, the exclusionary rule is an inherently inappropriate device for deterring Fourth Amendment violations that are the result of judicial miscalculation, rather than police misconduct. As the Court observed in *Janis* (428 U.S. at 448), application of the exclusionary rule must be tied to the identity of those who are to be deterred and the nature of the conduct that is to be controlled. In the Fourth Amendment context, "the exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." *Gates*, slip op. 18 (White, J., concurring). Accordingly, as was recognized by the plurality in *Sheppard* (82-963 Pet. App. A47-A49):

> The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as

> costly as it is when it is applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. As we have said, ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that [a] search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates. We question, therefore, whether suppression of evidence is necessary as a deterrent in cases where the police conduct was entirely proper, the defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct.

See also *United States* v. *Acosta*, 501 F.2d 1330, 1337 (5th Cir. 1974) (Gee, J., dissenting), modified, 509 F.2d 539 (5th Cir.), cert. denied, 423 U.S. 891 (1975); *State* v. *Lien*, 265 N.W.2d 833, 840-841 n.1 (Minn. 1978); *State* v. *Nolting*, 312 Minn. 449, 456-457 n.7, 254 N.W.2d 340, 345 n.7 (1977).

Thus, even if one accepts the premise that the exclusionary rule is capable of affecting police behavior in some circumstances, there is no basis whatsoever for assuming that it can have any impact on magistrates. Magistrates are not part of the law enforcement "team" (see *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450-453 (1971)); as neutral judicial officers, magistrates have no stake in the outcome of any criminal prosecution, and the threat that evidence may be excluded from trial cannot logically be expected to have a significant deterrent impact on them. Instead, judicial officers considering warrant applica-

tions presumably are motivated—like judicial officers performing other duties—to reach a correct decision.[22]

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[22] There is no constitutional requirement that an official issuing a warrant be either a judge or a lawyer, so long as the official is neutral and capable of assessing probable cause. See *Shadwick* v. *City of Tampa*, 407 U.S. 345, 348-350 (1972). In the federal system, however, magistrates will usually be trained and experienced lawyers. Thus, the Federal Magistrates Act of 1968 requires, with limited exceptions, that all magistrates have practiced law for five years (28 U.S.C. (Supp. V) 631 (b) (1)), that they be selected pursuant to merit selection procedures (28 U.S.C. (Supp. V) 631(b) (2)), and that they attend special training programs (28 U.S.C. 637). Although neither constitutionally required nor necessary to give rise to the preference that reviewing courts extend to a magistrate's determinations, we think these salutary features enhance the presumption of propriety that applies to a federal magistrate's probable cause determinations. These same enhancing considerations also apply to the warrants in *Leon* and *Sheppard*, both of which were issued by state court judges.

Moreover, because the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved" (*Calandra*, 414 U.S. at 348), relentless application of the rule in warrant cases is both unnecessary and unwise because suitable and efficacious substitute remedies, less costly to society, are available, at least in the federal system. A United States Magistrate, unlike a law enforcement officer, is subject to the control and direction of the district court and may be removed by the court for "incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. (Supp. V) 631(i). If it appears that a particular magistrate is serving merely as a "rubber stamp" or has demonstrated an inability to exercise mature judgment, a remedy is available that is far more direct and effective, and less costly to the criminal justice system, than the suppression of evidence in a later proceeding. Cf. *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6-7 & n.5 (deterrence rationale is an inappropriate basis for applying most severe sanctions when more narrowly tailored sanctions are available).

3. The suppression of evidence obtained pursuant to judicially-issued search warrants, even though an unintended extension of the exclusionary rule as originally conceived, might be justified if it furthered the rule's basic purpose of deterring police misconduct. But in fact it does no such thing. See *Gates*, slip op. 17 (White, J., concurring). Rather, "[i]mposing an admittedly indirect 'sanction' on the police officer in that instance is nothing less than sophisticated nonsense" (*Stone* v. *Powell*, 428 U.S. at 498 (Burger, C.J., concurring)), because law enforcement officers will never be deterred from executing a search warrant that a judge has told them is valid. "Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Ibid.*[23] See *United States* v. *Hill*, 500 F.2d 315, 322 (5th Cir. 1974); *Gifford* v. *State*, 630 S.W.2d at 391; cf. *United States* v. *Ross*, 456 U.S. 798, 823 n.32 (1982) ("[A] warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search"); *United States* v. *Alvarez-Porras*, 643 F.2d 54, 65-66 (2d Cir.), cert. denied, 454 U.S. 839 (1981) (deterrent purpose of exclusionary rule is not served in circumstances that include the agents' good-faith

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[23] As Professor Levy has noted (L. Levy, *Against the Law: The Nixon Court and Criminal Justice* 81 (1974)):

> [T]o penalize the police by holding that a magistrate had not scrutinized the facts with enough independence is comparable to penalizing a prosecutor by holding that the police obtained the evidence illegally. The sanction of the law strikes the wrong party when the police have obtained a warrant.

attempt to comply with the warrant requirement).[24] Quite clearly, neither the fundamental values of the Fourth Amendment nor the deterrent purpose of the exclusionary rule can be meaningfully advanced by the suppression of evidence in cases such as *Sheppard*, where a search warrant is invalidated because of a technical defect resulting from oversight;[25] suppressing it because the issuing official, although authorized by statute to issue warrants, is found to lack the requisite degree of neutrality, see *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971);[26] or suppressing it

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[24] See also Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1418-1419 (1981):

> A search conducted in accordance with the terms of the warrant necessarily involves good faith * * *. When the police have dutifully applied to a judge or a magistrate for a search warrant, and have executed the warrant in strict conformity with its terms, exclusion of the evidence thus obtained can have no possible deterrent effect on future police conduct.

Accord, P. Johnson, *New Approaches to Enforcing the Fourth Amendment* 8-9 (Working Paper Sept. 1978), quoted in 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.2, at 3 (Supp. 1982).

[25] See also *United States* v. *Shorter*, 600 F.2d 585 (6th Cir. 1979). In that case, suppression was ordered because, despite a clear demonstration of probable cause, the magistrate failed to administer an oath to the affiant "immediately" at the beginning of his telephonic application for a search warrant, as required by Rule 41 (c) (2) (D), Fed. R. Crim. P.

[26] Concurring in *Coolidge*, Justice Harlan noted that nothing in the unlawful conduct in that case touched on "core" Fourth Amendment values (403 U.S. at 491). See also *Bivens*, 403 U.S. at 418-419 (Burger, C.J., dissenting) (even assuming the conduct in *Coolidge* was improper, it "was surely insufficient in nature and extent to justify the drastic result dictated by the suppression doctrine"); Kaplan, *supra*, 26 Stan. L. Rev.

because, as in *Leon*, a reasonable presentation of information to a neutral judicial officer is later determined to fall short of probable cause, *e.g.*, *United States* v. *Karathanos*, 531 F.2d 26, 35 (2d Cir.), cert. denied, 428 U.S. 910 (1976); *United States* v. *Travisano*, 560 F. Supp. 627, 628-630 & n.2 (D. Conn. 1983), pending on appeal, No. 83-1159 (2d Cir., filed Apr. 28, 1983).

4. Application of the exclusionary rule to the fruits of judicially-warranted searches is not only ineffective in terms of deterrence, but may well reduce incentives for police resort to the warrant procedure, which this Court has repeatedly held is the constitutionally preferred method for safeguarding individual privacy rights. See *Gates*, slip op. 21; *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972); *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968); *United States* v. *Ventresca*, 380 U.S. 102, 106-107 (1965); *Johnson* v. *United States*, 333 U.S. 10, 14 n.3 (1948); 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.2, at 29 (1978).[27] Thus, a reasonable mistake exception to the exclusionary rule when a warrant has been obtained would provide a substantial incentive for law enforcement officers to utilize the preferred warrant procedure. See *Brown* v. *Illinois*, 422 U.S. at 611 & n.3 (Powell, J., concurring). Unlike instances in which

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at 1036 ("the police practices revealed in *Coolidge* v. *New Hampshire* are hardly incompatible with a moral society; yet letting the defendant in that case go free perhaps is").

[27] In explaining the essence of the Fourth Amendment, the Court has stated: "[W]here practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *United States* v. *United States District Court*, 407 U.S. at 316.

the police have acted without judicial authorization and in which an exclusionary rule might, in limited circumstances, provide a deterrent to future misconduct, resort to the warrant procedure itself provides a substantial alternative barrier to unreasonable or otherwise defective searches and seizures. See *Jones* v. *United States*, 362 U.S. 257, 270-271 (1960); *Johnson* v. *United States*, 333 U.S. at 14; *United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932). For this reason, the Court has recognized that errors of judgment by a magistrate should not necessarily be treated as severely as Fourth Amendment violations by law enforcement officers acting without judicial supervision and approval. See *Gates*, slip op. 21, 24; *United States* v. *Watson*, 423 U.S. 411, 423 (1976); *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969); *United States* v. *Ventresca*, 380 U.S. at 109; *Aguilar* v. *Texas*, 378 U.S. 101, 111 (1964); *Jones* v. *United States*, 362 U.S. at 270-271. As the Court explained in *Aguilar*, 378 U.S. at 111, quoting *Jones*, 362 U.S. at 271:

> [W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," * * * and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present. . . ."

A reasonable mistake exception to the exclusionary rule in the case of evidence seized pursuant to a warrant would thus fully comport with the special status the Court has attached to warrants in the past.

5. We do not suggest that the exclusionary rule is never appropriate when a search has been conducted pursuant to a warrant, or that the mere issuance of a warrant wholly forecloses further inquiry into the existence of probable cause. Even when a warrant has been obtained, suppression of evidence may be justified if the factors relied on by the magistrate "were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Brown* v. *Illinois*, 422 U.S. at 610-611 (Powell, J., concurring), or if the warrant was procured in bad faith or on the basis of material misrepresentations, see *Franks* v. *Delaware*, 438 U.S. 154 (1978). See also *Gates*, slip op. 19 (White, J., concurring).

For example, in *Nathanson* v. *United States*, 290 U.S. 41, 46 (1933), a search warrant was obtained "upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts." Similarly, in *Aguilar* v. *Texas*, 378 U.S. at 109 & n.1, the warrant was based on a "bare-bones" affidavit which, although averring probable cause, supplied no supporting facts. While the officers who executed the search warrants in *Nathanson* and *Aguilar* perhaps acted in good faith, certainly no officer today could reasonably rely on the validity of similar warrants in light of the unambiguous legal authority condemning "bare-bones" affidavits. Application of the exclusionary rule in such circumstances would be consistent with its historic underpinnings. But as Professor Amsterdam has written, "the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).[28]

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[28] In his concurring opinion in *Gates*, Justice White stated that he would apply the exclusionary rule "when it is plainly

Manifestly, the rare circumstances that might justify exclusion of the fruits of a judicially-warranted search are not present in the cases now before the Court. In *Leon*, the police took meticulous care to ensure that their conduct at all times comported with constitutional requirements. First, rather than acting precipitously based on an informant's tip, the police independently investigated the allegations in the tip through extensive surveillance of respondents and their various residences. When their surveillance confirmed the accuracy of much of the information provided in the tip, the police did not act on their own initiative, but instead sought a warrant from a neutral judicial officer.[20] Moreover, they provided the

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evident that a magistrate or judge had no business issuing a warrant" (slip op. 19). To the extent that this approach would focus on the conduct of the issuing magistrate, it appears to be analytically contrary to the proposition that the exclusionary rule is meant to deter police, not judicial, misconduct. In practice, however the distinction may be of little significance. In our view, those situations in which "a magistrate or judge had no business issuing a warrant" are probably coextensive with those situations in which "no well-trained officer could reasonably have thought that a warrant should issue" (*ibid.*). Thus, for exclusionary rule purposes, the danger of a hypothetical "runaway" magistrate can effectively be controlled by focusing on the objective reasonableness of the conduct of law enforcement officers in applying for and executing the search warrant. Of course, as we have noted above (see page 60 note 22, *supra*), personal sanctions are available to punish federal magistrates who are derelict in their duties.

[20] Because the officers' suspicion in this case focused in part on respondents' various automobiles, the police were not constitutionally obliged to obtain a warrant for that part of their proposed search. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42 (1970). Their decision to seek prior judicial approval for the search of the automobiles is indicative of the reasonableness of their conduct.

judicial officer with every bit of information they possessed that would assist him in making a reasoned, independent decision. And they executed the warrant properly and with no reason to be on notice that it was not valid. In turn, the judge issuing the warrant clearly had at least "reasonable cause to believe there was reasonable cause." H. Friendly, *Benchmarks* 261 (1967). In these circumstances, it would advance no Fourth Amendment policy to suppress the seized evidence.

While the kind of defect present in *Sheppard* is quite different from that found by the court of appeals in *Leon*, there too the Fourth Amendment would not be well-served by suppression. Admittedly, the search warrant was technically defective, and the defect, had it been noticed, would have been obvious to the issuing judge and to the officers as well. Moreover, the defect *could* have been significant if, for example, the police had attempted to exploit it by searching for items, such as drugs, for which they lacked probable cause and which the judge had not intended to authorize. But no such abuses occurred here. Instead, there is no question that the police had probable cause to seize the items specified in the warrant application, it is undisputed that the judge thought he was authorizing the police to conduct only the search described in the warrant application, and it is further undisputed that the police did in fact limit their search to that for which they thought they had valid authorization. The failure of the warrant to specify the items to be seized was, in short, entirely nonprejudicial to Sheppard's right to be free from unreasonable searches and seizures. Under these circumstances, only a policy of attempting to deter even

the most harmless human error could justify invocation of the exclusionary rule.[30] Such a policy would bear not the slightest resemblance to the policies that led to the exclusionary rule that the Court fashioned in *Weeks* and *Mapp*.[31]

C. In Light Of The Exclusionary Rule's Inability To Fulfill Its Deterrent Purpose When Applied To Reasonable Mistakes, Its Costs Are Higher Than Our System Of Criminal Justice Can Afford

Many of the costs of the exclusionary rule have been alluded to in previous sections of this brief. Nevertheless, in completing the cost-benefit analysis that we commend to the Court, it is appropriate to recapitulate briefly the most obvious costs and to elaborate more fully on some of the less evident ones.

First, the exclusionary rule excludes from consideration at trial the very evidence that is most relevant and trustworthy.[32] The rule thus subverts

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[30] As previously noted (see page 44 note 11, *supra*), the ALI has recognized that such a policy is inappropriate, and that striking the proper balance requires an assessment of the substantiality of the violation.

[31] We recognize that the Court has not heretofore applied the harmless error rule in considering the applicability of the exclusionary rule, but the facts in *Sheppard* quite clearly justify such an approach. The harmless error rule has of course long encompassed constitutional as well as non-constitutional errors (see *Chapman* v. *California*, 386 U.S. 18, 22 (1967)), and there is no reason why it should not encompass Fourth Amendment violations that do not result in any impairment of substantial rights of the defendant.

[32] As Judge Wilkey has observed, "it is all important that *there is never any question of reliability* in exclusionary rule cases involving material evidence * * *. An illegal search in no way reduces the reliability of the evidence." Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 Judicature 215, 222 (1978) (emphasis in original).

the courts' paramount truthfinding function. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. at 489; *id.* at 499-500 (Burger, C.J., concurring); *Janis*, 428 U.S. at 448-449.

Second, the exclusionary rule directly benefits only those who are unquestionably guilty. In the now-famous words of Justice Cardozo, particularly apt to consideration of a reasonable mistake exception, the rule allows "[t]he criminal * * * to go free because the constable has blundered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, cert. denied, 270 U.S. 657 (1926). The rule does nothing, however, to repair injury to innocent victims of unreasonable searches. While, judiciously applied, it may prevent future violations of constitutional rights, that objective can be accomplished by limiting use of the suppression sanction to cases in which substantial deterrence of future misconduct can realistically be expected.

Proponents of the exclusionary rule have argued that only a very small number of guilty defendants actually go free because of it, and that this is a small price to pay to safeguard the Fourth Amendment rights of all citizens.[33] In addition to the fact that the freeing of even one guilty defendant by virtue of an irrational application of the rule may exact a greater cost than society should be expected to bear (see pages 71-73, *infra*), this argument disregards evidence that tends to demonstrate very real costs, in numerical terms, of the rule's operation.

It is no doubt true, as Justice White observed (*Gates*, slip op. 12 (White, J., concurring)), that

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[33] See, *e.g.*, *The Exclusionary Rule Bills: Hearings on S. 101, S. 751 and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 35-37 (1981) (testimony of Stephen H. Sachs); 1 W. LaFave, *Search and Seizure* § 1.2 n.9, at 1 (Supp. 1982).

"[w]e will never know how many guilty defendants go free as a result of the rule's operation," but still certain conclusions are possible (*id.* at 12 n.13):

> The effects of the exclusionary rule are often felt before a case reaches trial. A recent study by the National Institute of Justice of felony arrests in California during the years 1976-1979 "found a major impact of the exclusionary rule on state prosecutions." National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California 2 (1982). The study found that 4.8% of the more than 4,000 felony cases declined for prosecution were rejected because of search and seizure problems. The exclusionary rule was found to have a particularly pronounced effect in drug cases; prosecutors rejected approximately 30% of all felony drug arrests because of search and seizure problems.[34]

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[34] A 1979 study by the General Accounting Office concluded that of all cases declined for prosecution by United States Attorneys, Fourth Amendment search and seizure problems were the *primary* reason for declination in only 0.4% of the total. Comp. Gen. Rep. No. GGD-79-45, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 14 (1979) [hereinafter cited as *GAO Report*]. Federal declinations may be low, however, because relatively few federal cases involve manifestly illegal searches. Assistant United States Attorneys may thus choose to go forward in a significant number of cases that have search and seizure problems that may be assessed as troublesome but worth litigating. This hypothesis is borne out by the frequency with which suppression motions are denied (*GAO Report*, *supra*, at 10). Moreover, it was later determined that "[m]ost of the federal caseload at the time the [GAO] study was conducted was composed of such white collar crimes as embezzlement, fraud and forgery. Search and seizure issues are seldom raised in these cases." National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California* 7 (1982) [hereinafter cited as *NIJ Report*].

Moreover, in cases in which prosecutors elect to proceed to trial despite successful suppression motions, the resulting conviction rates are dramatically impaired. *GAO Report*, *supra* note 34, at 13.[35] Although the systemic effects of the exclusionary rule have never been fully calculated, the limited studies available thus demonstrate that a definite relationship exists between the suppression of evidence and the prosecution's ability to obtain a conviction.[36]

But even if the numerical impact of the exclusionary rule were to be discounted, the rule exacts an exceedingly high societal cost. This Court has noted that the exclusionary rule may well serve to lessen public respect for the judicial system. "Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generat-

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[35] According to the GAO study, a conviction was obtained in more than 84% of the cases in which a suppression motion had been denied. The conviction rate dropped dramatically, however, to about 50%, whenever a suppression motion had been granted in whole or in part. *GAO Report*, *supra* note 34, at 13.

[36] The deleterious effects of the exclusionary rule on law enforcement are exacerbated by its tendency in practice to free the recidivist. As the NIJ study noted (*NIJ Report*, *supra* note 34, at 2):

> For most defendants, the arrest that ended in release because of the exclusionary rule was only a single incident in a longer criminal career.
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> To a substantial degree, individuals released because of search and seizure problems were those with serious criminal records who appeared to continue to be involved in crime after their release. The felony rearrests included many drug crimes, but the majority were for crimes against persons or property, or for other felony offenses.

ing disrespect for the law and administration of justice." *Stone* v. *Powell*, 428 U.S. at 490-491. Moreover, indiscriminate application of the exclusionary rule may foster a public perception that the courts are simply unaware of reality. See *Bivens*, 403 U.S. at 415 (Burger, C.J., dissenting) (deterrence rationale is "hardly more than a wistful dream").[37]

In part, this problem of public perception arises because the exclusionary rule, as currently applied, lacks the vital ingredient of proportionality.[38] As the Chief Justice observed in his concurrence in *Stone* v. *Powell*, 428 U.S. at 490 (footnote omitted): "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."[39] This cost of the exclusion-

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[37] It may be significant in this regard that "no other civilized country has adopted our mandatory rule of the exclusion of probative material evidence because of police misconduct." Wilkey, *supra*, 1 Crim. Just. Ethics at 23. Moreover, the decision of other countries *not* to adopt an exclusionary rule has generally come after careful and deliberate study. See, *e.g.*, *id.* at 23-24 & 26-27 nn. 26-35.

[38] Prompted by the belief "that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation," the Attorney General's Task Force on Violent Crime has recommended the adoption of a reasonable good-faith exception to the exclusionary rule. *Attorney General's Task Force on Violent Crime, Final Report* 55-56 (1981).

[39] Judge Wilkey has made the same point, perhaps more graphically, dissenting in *United States* v. *Ross* (655 F.2d at 1208), in language that foreshadows the *Sheppard* case:

> [The] penalty [of the exclusionary rule] is administered with a sense of proportionality reminiscent of those medieval penal systems that prescribed capital punishment for everything from pickpocketing on up. The rule falls mer-

ary rule is particularly evident in cases such as those now before the Court, in which it cannot seriously be urged that the police engaged in any misconduct. See pages 48-49, 66-68, *supra*. On the other hand, there can be little doubt that the suppressed evidence, if admitted, would conclusively establish the respondents' guilt.

The chilling effect on legitimate police activities is another less visible but equally important cost specifically associated with suppression of evidence garnered in good faith violations of the Fourth Amendment. As the circumstances surrounding a particular proposed course of action bring it closer to the indistinct line often separating lawful from unlawful searches or seizures, a relentless application of the exclusionary rule is increasingly likely to deter the former rather than the latter, since almost by definition this class of situations is as likely to involve legal as illegal police activity.[40] "To the extent the rule operates to discourage police from reasonable and proper investigative actions, it hinders the solution and even the prevention of crime." *Gates*, slip op.

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cilessly on evidence deemed to have been seized unconstitutionally, without regard for the gravity of the police misconduct or the seriousness of the crime of which the defendant has been charged. Even if the policeman's actions were only marginally in violation of the Constitution despite his good faith while the criminal is guilty of rape and murder, still the evidence stays out. Such a disproportion would be regarded as barbaric if used to deter crime; ironically, employed to deter the police many apparently consider it "progressive."

[40] In addition, these are the very cases in which it is most likely that courts would *erroneously* conclude that the Fourth Amendment has been violated, with the unhappy result of suppressing lawfully obtained evidence. See page 51 note 16, *supra*.

12 (White, J., concurring). Once application of the rule approaches the point at which it is as likely to chill legitimate police action as to discourage marginally improper action, powerful justifications indeed are needed to justify such results.[41]

Still another cost of the exclusionary rule is its failure to provide any remedy for the innocent victims of unlawful searches and seizures. Even for the criminal defendant, the primary effect of the rule's application—aiding him to secure an acquittal even though he is guilty—does not itself repair the breach of privacy that the Fourth Amendment protects. See *Calandra*, 414 U.S. at 347; *Linkletter* v. *Walker*, 381 U.S. at 637. And the exclusionary rule is, of course, an entirely meaningless "remedy" when the victim of the unlawful search is never accused of a crime. See *Bivens*, 403 U.S. at 410 ("[f]or people in Bivens' shoes, it is damages or nothing"); *id.* at 415-416, 417-418 (Burger, C. J., dissenting).

A further cost of the exclusionary rule, often paid insufficient attention, is the burden it places on the judicial system. One-third of federal defendants going to trial file Fourth Amendment suppression motions, and 70% to 90% of these involve formal hearings. *GAO Report*, *supra* note 34, at 10. Although most of these motions are denied (*ibid.*), the effect on judicial and prosecutorial resources is the same as if

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[41] The Court has recognized the same point in holding that public officials enjoy at least qualified immunity in civil damages actions brought under 42 U.S.C. 1983. In *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974), the Court observed:

> Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

the motions were meritorious. Significantly, the result of this diversion of resources from criminal trials to pretrial motions may have its harshest impact on innocent defendants. See *United States* v. *Ross*, 655 F.2d at 1205-1206 (Wilkey, J., dissenting):

> To understand how the innocent defendant is victimized by the diversion of scarce resources from criminal trials to police discipline, it is necessary briefly to consider how our criminal justice system now operates in fact, if not in theory. * * * [It] ensures that more due process will be required than the system can afford to pay for. As a result, trials have now been priced too high to be held in most circumstances * * *.
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> Instead, we have come increasingly to rely on an informal system of negotiated settlements in the form of plea bargained arrangements between prosecutor and defendant. The results are woeful. Criminals guilty of grievous offenses routinely are permitted to escape with convictions for crimes far less serious carrying only wrist-slapping penalties. Meanwhile innocent defendants who might well have been vindicated at trial are coerced into settling for a conviction on a lesser charge * * *.
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> It is against this background that we must measure the diversion of energy, talent and dollars from the central task of fairly determining the guilt and innocence of defendants into the work of adjudicating whether the police have blundered. * * * That function should be performed elsewhere and by others. The exclusionary remedy thus literally buys what little in the way of Fourth Amendment protection it affords at the cost of more trials for criminal defendants. Even if the rule did a fair job of promoting

> Fourth Amendment values, this would be at best a questionable bargain.[42]

Finally, the exclusionary rule in the long run threatens the very Fourth Amendment values it is intended to safeguard. "If one were diabolically to attempt to invent a rule sure slowly to undermine the substantive reach of the Fourth Amendment, it would be hard to do better than the exclusionary rule." *United States* v. *Ross*, 655 F.2d at 1206 (Wilkey, J., dissenting). This is because of the obvious reluctance of judges to condemn questionable practices under the Fourth Amendment when they know that the result of their decision will be the freeing of a guilty defendant. The Court has noted the same effect in considering the permissibility of a retrial under the Double Jeopardy Clause (*United States* v. *Tateo*, 377 U.S. 463, 466 (1964) (emphasis added)):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained

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[42] The workload generated by the exclusionary rule does not, of course, cease at the trial court level. For example, Judge Wilkey has pointed out that, over a three-year period, 22.1% of the published opinions of the United States Court of Appeals for the District of Columbia Circuit in criminal cases involved suppression issues. Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule*, 95 F.R.D. 211, 220 (1982). Similarly, a substantial portion of this Court's criminal docket regularly involves Fourth Amendment search and seizures issues. See page 51 note 16, *supra*. This expenditure of judicial resources on suppression issues continues unabated even though "the general principles applicable to claims of Fourth Amendment violations are well settled * * *." *Arkansas* v. *Sanders*, 442 U.S. 753, 757 (1979). The most plausible explanation for this phenomenon, of course, is that the windfall benefits of the exclusionary rule for guilty defendants are so great that they effectively negate the likelihood of meaningful self-screening.

such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. *From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution.*

Similar concerns operate in the context of the exclusionary rule. In addition, public support for the values served by the Fourth Amendment can too easily be undermined by a general perception that Fourth Amendment jurisprudence is bringing about the seemingly unjustified release into society of dangerous criminals. Thus, extravagant applications of the rule cannot help but threaten the substantive safeguards of the Fourth Amendment.

D. The Objections To A Reasonable Mistake Exception To The Exclusionary Rule Are Insufficient To Overcome The Need For Modification

We think it evident that the foregoing cost-benefit analysis of the exclusionary rule demonstrates the need for a properly designed reasonable mistake exception to the rule. Although many of the practical details concerning the application of such an exception are best left to future cases and initial resolution by lower courts, cf. *United States* v. *Williams*, 622 F.2d at 847; *United States* v. *Nolan*, 530 F. Supp. at 399, we shall undertake briefly to answer some of the most commonly-voiced objections to our proposal.

1. Critics of a reasonable mistake exception to the exclusionary rule invariably argue that it would "put[] a premium on 'police ignorance.'" [43] This is a palpable strawman. As the Fifth Circuit explained in *Williams*, 622 F.2d at 841 n.4a, the test for applying the exception is essentially objective:

> We emphasize that the belief, in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully. Thus, a series of broadcast breakins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could never qualify.[44]

See also *Gates*, slip op. 21 (White, J., concurring); *United States* v. *Nolan*, 530 F. Supp. at 399; *People* v. *Adams*, 53 N.Y.2d at 9-10, 422 N.E.2d at 541; Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 Crim. Just. Ethics 35, 38-39 (1982); Schroeder, *supra*, 69 Geo. L.J. at 1420; Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 655 (1978); cf. *Scott* v. *United States*, 436 U.S. 128, 137-138 (1978).

The objective standard we propose ensures that ignorance will not be rewarded. On the contrary, "[g]rounding the modification in objective reason-

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[43] See, *e.g.*, Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 Crim. Just. Ethics 28, 32 (1982).

[44] The Fifth Circuit's good-faith exception thus entails a subjective component. See also *United States* v. *Mahoney*, slip op. 6704-6705. For the reasons discussed below, however, it is our submission that the subjective inquiry will almost always be unnecessary and inappropriate.

ableness * * * retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." *Gates*, slip op. 15-16 n.15 (White, J., concurring). Because such an objective standard requires individual officers to have a reasonable knowledge of what the law prohibits, see *United States* v. *Peltier*, 422 U.S. at 542; *United States* v. *Ajlouny*, 629 F.2d at 841; *United States* v. *Nolan*, 530 F. Supp. at 399, the adoption of a reasonable mistake exception may actually enhance, but in any event certainly will not discourage, efforts to educate police officers about the extant principles of law. To avoid the risk of suppression through unreasonable ignorance,[45] police departments can be expected (assuming validity in the hypothesis of deterrence by which the rule is justified in the first place) to ensure that individual officers are reasonably well trained, especially as the extent to which a police department takes seriously its duty of providing training and guidance to officers in the field might be considered in determining whether the exclusionary rule should be invoked. See *Gates*, slip op. 15-16 n.15 (White, J., concurring); Kaplan, *supra*, 26 Stan. L. Rev. at 1050-1051.

The objective standard we propose is consistent with the standard applied in civil suits against public officials for alleged deprivations of constitutional rights. See *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 17: "government officials performing discretionary functions generally are shielded

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[45] See, *e.g.*, *United States* v. *Downing*, 665 F.2d 404, 408 n.2 (1st Cir. 1981) (no occasion to apply a good faith exception because the necessary predicate of objectively reasonable police conduct not satisfied); *Holloman* v. *Commonwealth*, 221 Va. 947, 950, 275 S.E.2d 620, 622 (1981) (accord).

from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." [46] Importantly, the Court in *Harlow* expressly rejected the civil equivalent of the "premium on police ignorance" argument (*id.* at 18; footnotes omitted):

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967).

The same considerations apply with equal force to criminal law enforcement.

2. Because the focus of the inquiry will be objective reasonableness, rather than an officer's subjective intent, the reasonable mistake exception we propose is not likely to burden the courts unduly. Generally, it will be unnecessary for courts to engage in unwieldy

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[46] As the Court explained (*Harlow*, slip op. 17-18):

> If the law at that time [of the official's action] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

and awkward inquiries into the subjective intent of arresting or searching officers. Instead, a reasonable mistake exception would require only an objective assessment of the officer's conduct in light of the factual circumstances of a particular case and the extent to which the governing legal principles had been predictably articulated.[47] It will, therefore, merely require courts to make determinations of a kind that are not materially different from those they presently make in ruling upon suppression motions.[48]

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[47] Furthermore, it seems unlikely that there will be many occasions on which a reasonable officer would not have known that his action was improper, but the particular officer did entertain such a belief; the inclusion of a subjective component will therefore rarely alter the result, but would instead merely produce burdensome and largely unproductive litigation. See *Harlow*, slip op. 18. It is possible, however, to imagine cases in which the objective reasonableness of a belief in the legality of particular conduct could be overcome by a showing that, for example, the victim of the search was singled out for harassment. In such strictly limited circumstances, a subjective inquiry might be appropriate. Plainly, no such circumstances are present in the cases now before the Court.

[48] Even if additional burdens were imposed, Judge Friendly has suggested that they would be preferable to the current system (H. Friendly, *Benchmarks*, *supra*, at 262; footnotes omitted):

> It is no sufficient objection that such a rule would require courts to make still another determination; rather, the recognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve them of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one. Even if there were an added burden, most judges would prefer to discharge it than have to perform the distasteful duty of allowing a dangerous criminal to go free because of a slight and unintentional miscalculation by the police.

3. It is sometimes suggested that the exclusionary rule is needed to provide Fourth Amendment cases for the courts to adjudicate. See, *e.g.*, Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hastings L.J. 1065, 1074 (1982); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 Wash. U.L.Q. 621, 654-656; Oaks, *supra*, 37 U. Chi. L. Rev. at 756. "The risk [in modifying the exclusionary rule] is that our constitutional rights will atrophy." Geller, *supra*, 1975 Wash. U.L.Q. at 655 (footnote omitted).

This presumed risk should be placed in proper perspective. Assuming, arguendo, that adoption of a reasonable mistake exception to the exclusionary rule would substantially reduce the incentive for defendants to litigate substantive Fourth Amendment questions, the Court should bear in mind that the lost decisionmaking opportunities will be confined to the "grey, twilight area[s]" of Fourth Amendment law where the constitutional violation, if any, is minimal. In these areas at least, it would seem that our society would reap greater benefits from a more rational application of the exclusionary rule than from continued judicial resolution of every Fourth Amendment question that inventive lawyers can devise. Just as there is a point of diminishing returns in the application of the exclusionary rule,[49] so too there is a point at which decisions of only marginal constitutional significance may be overpriced.

In any event, we are extremely skeptical about the validity of any assumption that defendants will lose their incentive to litigate meritorious substantive Fourth Amendment questions if confronted with a

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[49] Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).

reasonable mistake exception to the exclusionary rule. The overwhelming lack of success of most suppression motions (see page 74, *supra*) does not seem to have had any effect on the number of such motions filed. Practical experience tells us that criminal defendants commonly assert suppression claims with little regard for their ultimate chances of success—in part, no doubt, because of the magnitude of the benefit to them if "lightning" should strike. While adoption of a reasonable mistake exception will tend to discourage presentation of substantively insubstantial Fourth Amendment suppression motions, it thus seems highly improbable that litigation of colorable Fourth Amendment issues will "atrophy" to any significant degree.

Although the number of cases may not materially decline, there would be an important easing of the judicial workload because it would no longer be necessary for courts to decide every conceivable question of Fourth Amendment law. Many of the arguably meritorious Fourth Amendment claims that courts must now resolve present, like *Leon* and *Quintero*, fact-specific questions the resolution of which, while often difficult, does little to advance understanding of Fourth Amendment principles of general importance. In such instances, it will generally be far easier to determine the applicability of the reasonable mistake exception than to grapple with the nettlesome but relatively inconsequential underlying substantive question. The modification we propose should thus result in important advances for the cause of judicial economy.

On the other hand, we see no jurisprudential impediment to a court's undertaking to decide important, recurrent, and unsettled substantive Fourth Amendment questions even when the reasonable mistake exception may control the outcome of the partic-

ular case. That is precisely what this Court did in an analogous context in *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). We therefore view the issue of whether to decide the substantive question first or to dispose of a case strictly on the basis of a reasonable mistake exception as one best committed to judicial discretion. In nonrecurring, fact-bound situations, a court might well conclude that little purpose is served by unnecessarily adjudicating the Fourth Amendment question. On the other hand, significant legal issues or particularly problematic factual situations of concern to a court could still be considered.[60]

This would be comparable to the approach now employed by this Court in applying the harmless error doctrine. In some cases, the Court exercises its discretion to decide the merits of a claim even though the error was harmless, while in others it resolves the case solely by reliance on the harmless error doctrine. Compare, *e.g.*, *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972) (Court declines to decide whether admission of confession was constitutional violation because error, if any, was harmless beyond a reasonable

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[60] *United States* v. *Ajlouny*, 629 F.2d at 841-842, offers a good example of a court's sound exercise of discretion in *declining* to decide the legality of a search in light of the applicability of a good-faith exception. The legal question involved warrantless national security wiretaps. Subsequent to the surveillance of Ajlouny, the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1801-1811, became effective. That Act, by requiring prior court approval for nearly all foreign intelligence surveillance, "substantially reduced the importance of deciding in this case whether the Constitution independently requires the obtaining of a warrant for foreign intelligence electronic surveillance" (629 F.2d at 842). Accordingly, the court disposed of the case by relying on the good-faith exception. See also *United States* v. *Mahoney*, slip op. 6705 n.5 (merits of Fourth Amendment issue neither briefed nor argued and therefore court declines to decide the issue).

doubt), with *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (Court holds defendants constitutionally entitled to counsel at preliminary hearing, but remands to state court for determination whether denial of counsel was harmless error);[61] see also *United States* v. *Blackwell*, 694 F.2d 1325, 1340 n.22 (D.C. Cir. 1982) (court explains reasons for deciding constitutional question before determining there was no "plain error").

Leaving this matter to judicial discretion in individual cases does no violence to Article III's case or controversy requirement. Nothing in Article III prevents a court from analyzing the issues presented by a suppression motion in whatever order it deems most appropriate. The essence of Article III is that the judicial power be exercised only in live controversies presenting concrete disputes between adversaries. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). There can be no doubt that a defendant who claims that he has been subjected to an unlawful search or seizure and seeks suppression of the evidentiary fruits thereof raises a live controversy within the Article III authority of federal courts to adjudicate. And, as a matter of logic, it is surely appropriate for a court to decide whether there

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[61] The courts of appeals routinely exercise similar discretion in applying the harmless error doctrine. Compare, *e.g.*, *United States* v. *West*, 670 F.2d 675, 684-687 (7th Cir.), cert. denied, 457 U.S. 1124 (1982); *United States* v. *Bulman*, 667 F.2d 1374, 1382-1384 (11th Cir. 1982); *Harryman* v. *Estelle*, 616 F.2d 870, 878 (5th Cir. 1980) (en banc); *United States* v. *Rosales-Lopez*, 617 F.2d 1349, 1355-1356 (9th Cir. 1980), aff'd, 451 U.S. 182 (1981), with, *e.g.*, *United States* v. *McCulley*, 673 F.2d 346, 352 (11th Cir. 1982); *United States* v. *Civella*, 666 F.2d 1122, 1130 (8th Cir. 1981); *United States* v. *Torres*, 659 F.2d 1012, 1013 (9th Cir. 1981), cert. denied, 455 U.S. 926 (1982).

has been a wrong before deciding what remedy to impose. See *Gates*, slip op. 19 n.18 (White, J., concurring).[82]

Finally, as noted by Justice White (*Gates*, slip op. 20 & n.19 (White, J., concurring)), many important Fourth Amendment issues can be resolved in other settings, such as actions for declaratory or injunctive relief brought by persons having a reasonable fear of future exposure to the challenged practice, or damages actions against municipalities under 42 U.S.C. 1983. Accordingly, the fear that Fourth Amendment law will become "frozen" in its current state seems groundless.

4. Finally, both supporters and critics of the exclusionary rule have expressed reluctance about modifying it in the absence of an effective alternative.

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[82] In *Gates*, Justice White also suggested that the benefits of a new Fourth Amendment ruling might be extended to the party in whose case the rule is first announced (slip op. 21 n.19, citing *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967)). This aspect of *Stovall*, however, has been roundly criticized. See Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1615 (1975) (footnote omitted):

> Stated bluntly, the "chance beneficiary" notion, developed in *Stovall* and relied on in *Desist* [v. *United States*, 394 U.S. 244 (1969)] and other cases, is not and never was required by article III. Cases in which a new rule is adopted but applied in a wholly prospective fashion are nonetheless decided on the merits. Although with a prospective holding the result in the law-changing case turns on the old rule, not the new one, that fact does not remove the case from the category of an article III case or controversy. If it did, the Court would have acted improperly (indeed, unconstitutionally) in *England* [v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964)], *Cipriano* [v. *City of Houma*, 395 U.S. 701 (1969)], and the other cases adopting new rules for purely prospective application.

See, *e.g.*, *Bivens*, 403 U.S. at 415, 420-421 (Burger, C.J., dissenting); Goodpaster, *supra*, 33 Hastings L.J. at 1100; Geller, *supra*, 1975 Wash. U.L.Q. at 688. If the exclusionary rule were actually capable of deterring reasonable police mistakes, this concern would have some force. We have already noted, however, as has the Court (see pages 40-41, *supra*), that there is at most an impressionistic basis for the assumption that the exclusionary rule in fact deters police misconduct. More importantly, in many of the cases to which a reasonable mistake exception would apply, there is no misconduct to deter. Under these circumstances, it simply makes no sense to hold on to a demonstrably costly "remedy" that is incapable of achieving its stated purpose. In our submission, the exclusionary rule must be evaluated on its own merits; if it fails to accomplish its objective, it should be appropriately modified, irrespective of the efficacy of the alternatives that might be substituted.

In any event, a number of alternatives have been suggested. See, *e.g.*, Wilkey, *supra*, 1 Crim. Just. Ethics at 24-26 (suggests executive branch disciplinary boards, civil tort remedies, or "mini-trials" for offending officers following the main criminal trial); Goodpaster, *supra*, 33 Hastings L.J. at 1100-1107 (recommends administrative agency regulation of police conduct). Whether any of these alternatives will be effective cannot be known until they are tested; what should be obvious, however, is that the alternatives cannot possibly be any *less* effective than the exclusionary rule in its current form for cases like the ones now before the Court. Moreover, as has been noted by others, the continued existence of the exclusionary rule may itself actually inhibit experimentation with different approaches by the political branches of government. See *Stone* v. *Powell*, 428

U.S. at 500-501 (Burger, C.J., concurring); *United States* v. *Ross*, 655 F.2d at 1208 (Wilkey, J., dissenting); Schroeder, *supra*, 69 Geo. L.J. at 1385. Accordingly, we submit that the presence of immediately available effective alternatives is simply not a controlling consideration in deciding whether the current rule requires the kind of modification that we propose.

CONCLUSION

The judgments under review should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

ROBERT J. ERICKSON
Attorney

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